The Foreign Acquisitions And Takeovers Act 1975 - An Administrative Law Perspective

Master of Public Law - Sub Thesis

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This sub-thesis is all the work of Steven James Francis. All sources have been acknowledged and been given credit where appropriate.

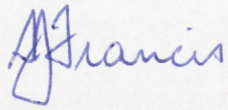

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TABLE OF CONTENTS

" That all true believers shall break their eggs at the convenient end": and which is the convenient end, seems in my humble opinion, to be left to everyman's conscience or at least in the power of the chief magistrate to determine."

Gulliver's Travels: A Voyage to Lillliput
Jonathan Swift Everymans Library 1986

The Foreign Acquisitions and Takeovers Act 1975 (the FAT Act) was enacted in 1974[1] to allow the Commonwealth to review the inflow of capital into Australia and the sale of Australian business interests to foreigners. The provisions of the FAT Act were litigated for the first time in the Act's twenty year history in Leisure & Entertainment Pty Ltd v The Honourable Ralph Willis Federal Treasurer of the Commonwealth of Australia[2], despite the fact that the subject matter of the FAT Act and the decisions of the Treasurer are often the subject of community discussion, comment and controversy.[3] The Australian icons of Vegemite, Arnott's and Speedo, or more strictly the companies that own these brand names, have all been sold to foreign interests with the Treasurer's consent. All these sales sparked comment and discussion. Section 18(2) of the FAT Act permits a foreign company to acquire the shares of an Australian company, so long as the acquisition is not contrary to the national interest. The Treasurer is designated by the FAT Act to make this decision.[4] The takeover by Conrad Black of the Fairfax Group in 1993 provided the Senate with an opportunity to investigate the workings of the Foreign Investment Review Board (FIRB) and undertake a comprehensive review of Australia's Foreign Investment

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[1]The FAT Act was enacted in 1974 under the title of the Foreign Takeovers Act (" the FT Act"). For a more detailed history of the FAT Act see page 4 and following.

[2]No QG 204 of 1995 Spender J Brisbane 2 January 1996 Judgement 1 of 1996.

[3]The sale of the food division of Pacific Dunlop Ltd to foreign interests in July 1995 resulted in comment both in the popular press and television.

[4]For a detailed discussion of the provisions of the FAT Act see Chapter 2 "The FAT Act: a Short Analysis".

policy.[5] Up until this time the workings of the Foreign Investment Branch of Treasury (FIB) and the FIRB had been shrouded in mystery. Yet the FIRB is still unwilling to release information given to it, explain its decision-making processes or even give reasons for its decisions. This poses some interesting questions for the public lawyer.

The FAT Act imposes one criterion upon the Treasurer when he makes his decision on the acquisition by a foreign person: he must address the question, is the proposed acquisition contrary to the national interest?[6] What, then, is the national interest? What issues constitute the national interest? Do the Courts have a proper role in reviewing the decisions of the Treasurer? Should the Courts involve themselves in a review, which is, at first glance, in the realm of politics and economics and involves multifaceted and multi-discipline decision making?

A review of the decisions of the Treasurer may be justified on a number of bases. The most obvious reason is that the Treasurer has made a decision that is ultra vires the FAT Act. Less obvious reasons may involve an applicant who uses judicial review grounds to defend a criminal charge brought under the FAT Act; that is, the act alleged to be unlawful cannot be unlawful as the decision upon which the unlawful act is based is a nullity; or, a corporation or a person attempts to stop the divestiture of assets by the Treasurer under the divestiture provisions. In these last two cases, the applicant is using judicial review grounds as a form of collateral attack against the decision of the Treasurer.

The FAT Act although small in size[7], is quite complex. The FAT Act has five operative sections dealing with (i) acquisition of shares,[8] (ii) acquisition of assets,[9] (iii) arrangements relating to the control of the Board of Directors or alteration of the

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[5]**Percentage Players: The 1991 and 1993 Fairfax Ownership Decisions**: The First Report of the Senate Select Committee on Certain aspects of Foreign Ownership Decisions in Relation to the Print Media; Senate Printing Unit Canberra 1994 (the Senate Print Media Inquiry)

[6]For a detailed discussion of the provisions of the FAT Act see Chapter 2 "The FAT Act: a Short Analysis".

[7]The FAT Act has only 39 clauses and 3 regulations.

[8]FAT Act s18

[9]FAT Act s19

constituent documents of companies,[10] (iv) arrangements relating to the control of Australian businesses[11] and (v) the acquisition of Australian urban land.[12] An effort has been made in recent years to reduce the number of transactions that the FAT Act controls.[13] However, this does not detract from the fact that non-compliance with its terms may lead to quite draconian measures being taken by the Treasurer.[14]

Foreign Investment Policy in Australia

Australia has traditionally been a large net importer of capital which has been used to supplement Australian domestic savings. The policy of successive Australian governments has been to welcome foreign investment into Australia. The purpose of this investment is to encourage economic growth through increased economic activity. The perceived benefits of the investment of foreign capital are considerable: the investment provides access to new technologies, management skills and overseas markets and ultimately an increased standard of living. The policy is designed to be consistent with Australian needs by encouraging the development of export oriented industries to increase Australia's international competitiveness. The present Australian Government policy was published in 1992 by the then Treasurer John Dawkins.[15] The present policy is premised on the joint beliefs that the 'international nature of trade' and the freeing up of markets enhance Australia's ability to sustain economic growth.[16]

Opinion is divided as to whether foreign investment should be regulated. The removal of foreign investment regulations to allow for the unrestricted interplay of market

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[10]FAT Act s20
[11]FAT Act s21
[12]FAT Act s21A
[13]The thresholds that exempt transactions from the provisions of the FAT Act were raised in 1992. See **Australia's Foreign Investment Policy** AGPS, Canberra, September 1992, p 2
[14]The Treasurer is entitled to order divestiture of assets (s19(2)), rearrange the constituant documents of a corporation (s20(2)), the divestiture of shares (s18(2)) are examples. The Treasurer is also entitled to institute criminal sanctions. For a further discussion of these see Chapter 2.
[15]**Australia's Foreign Investment Policy**, AGPS, Canberra, September 1992, p v.
[16]**Australia's Foreign Investment Policy**, AGPS, Canberra, September 1992, p v.

forces to determine the right level of foreign investment is one argument.[17] However Professor Frank Stillwell[18] raises six arguments against the unrestricted use of foreign investment:

> "1. The reliance upon overseas investment, together with corporate borrowing, is responsible for many of Australia's economic difficulties;
> 2. There are dependency problems whereby the fortunes of the local economy have become reliant on decisions taken overseas;
> 3. Foreign capital inflows have the potential to accumulate boom and bust cycles;
> 4. The reliance on foreign capital is not conducive in many respects to the development;
> 5. Some overseas companies may not be appropriately discharging their obligation to pay taxes to the Australian government; and
> 6. Cultural imperialism, for example, in the media may also be a problem."[19]

The community is not so ready to accept the necessity for or the present level of foreign investment in Australia. The takeover of Arnott's Pty Ltd by Campbell Soups Inc and the continuing Fairfax saga are examples of community concern. Community expectation seems to run in favour of a heavily controlled foreign investment policy.[20]

Australia is a signatory to the OECD Declaration on International Investment And Multinational Enterprises (1976)[21] as amended. This document requires the strengthening of co-operation between members in the field of international direct investment. This is achieved by making "local regulations and administrative practices as transparent as possible so that their importance and purpose can be ascertained and the information on

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[17]Dr David Robertson, Senior Research Fellow, National Centre for Development Studies, ANU, Canberra, in evidence to the Senate Print Media Inquiry at p 174 put forward this view. He had been a member of the FIRB division. See List of Witnesses Senate Print Media Inquiry Appendices 17

[18]Associate Professor of Economics, University of Sydney, NSW. See List of Witnesses Senate Print Media Inquiry Appendices 17

[19]Senate Print Media Inquiry para 7.5 p174 - 5

[20]See discussion in the majority opinion of the Senate Print Media Inquiry, paras 7.8 and 7.9, p175-176.

[21]Australia associated itself with the declaration and a number of procedural decisions in June 1976.

them can be readily available."[22] However, as the Senate Print Media Inquiry determined, many signatory countries have foreign investment restrictions in place.[23]

The FAT Act has had a twenty year history. It was preceded by the Foreign Takeovers Act (1974) (the FT Act) which was introduced by the Whitlam government. This was done to allay community disquiet in the 1960s and early 1970s of the unregulated inflow of foreign capital, 'rising levels of foreign ownership and control of Australian industry and resources.'[24] The FT Act established a requirement that successful applications for foreign investment proposals had to show a 'demonstrable benefit to Australia' and that Australian interests had adequate opportunity to purchase the business or property in question.

In 1976 the Fraser government established a non-statutory board known as the Foreign Investment Review Board (FIRB). The FIRB replaced the committee of public servants who had, until that time, advised the government in respect of decisions made under the FT Act. This change was designed to give the government independent advice from persons who reflect community and business sector interests.

By a legislative change in 1986, the Hawke Government removed the 'net economic benefit' test and its accompanying requirement that Australians be given an opportunity to purchase any business created, or taken over, by the foreign investment. These two requirements were replaced with the all inclusive 'national interest' test. The Hawke government regarded this test as a reflection of the proposition that 'foreign direct investment is typically of benefit to the recipient economy'.[25] The overall policy focus was not changed because of this new test. The new test seemingly only facilitated the review of applications rather than establishing any fundamental change in government policy.

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[22]OECD Declaration on International Investment and Multinational Enterprises (1976) III Conflicting Requirements

[23]Chart 7.1 Senate Print Media Inquiry p177 quoting International direct investment policies and trends in the 1980's (OECD Paris 1992) p38.

[24]Senate Print Media Inquiry para 7.17 p178.

[25]Treasury submission Senate Print Media Inquiry para 7.22 p179.

The FT Act was extensively amended in 1989 and renamed the FAT Act. The amendments raised the threshold for review of investment proposals and strengthened the penalties for non-compliance with the provisions of the Act. The FAT Act also saw the introduction of acceptance of proposals subject to certain conditions. There had been some concern under the FT Act that the Treasurer was unable to impose conditions on applications.[26]

Administration of Australian Foreign Investment Policy

Australian foreign investment policy is administered by the FIB. The FIB undertakes the day to day administration associated with foreign investment applications. The FIB has direct contact with the applicant and any interested parties; it examines all applications to see if they conform with the present foreign investment policy; it not only processes applications, it also advises applicants on how to structure applications to meet policy guidelines. The FIB then draws up a report, containing its recommendations, in the form of a departmental minute. The report is forwarded to the FIRB and the FIRB may make changes or agree with the FIB recommendation before the submission is submitted for approval or rejection by the Treasurer or the Assistant Treasurer. The FIB has been delegated the authority to approve applications in the residential real estate sector where the application complies with existing policy. The FIB is not a secretariat for the FIRB, as the Senate Print Media Inquiry found :

> "... [The] Treasury staff are public servants employed to administer existing government policy and facilitate the development of new or revised policy, where necessary, using FIRB as a mechanism to those ends."[27]

The FIB also has an enforcement role. Any of the conditions which are imposed on applications are enforced by the FIB staff. This feature of the role of the FIB is rarely emphasised.

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[26]Up until this time conditions had been imposed although successive governments were not always convinced that they could enforce them. See the Senate Print Media Inquiry p179-180.
[27]Senate Print Media Inquiry para 8.17, p 198

It is often thought that the FIRB administers foreign investment policy in Australia.[28] This is not the case. The FIRB was established to advise the government on policy and to give recommendations and advice about proposed investments. The FIRB functions as a non-statutory board. The functions of the FIRB are as follows:

1. to examine proposals by foreign interests for investment in Australia and to make recommendations to the government on those proposals;
2. to advise the government on foreign investment matters generally;
3. to foster an awareness and understanding of the government's policy in the community at large and in the business sector, both in Australia and abroad; and
4. to provide guidance, where necessary, to foreign investors so that their proposals may be in conformity with policy.[29]

The executive member of the FIRB, Mr Tony Hinton[30], summarised the role of FIRB to the Senate Print Media Inquiry as follows:

> "[The] FIRB is an advisory body. It provides advice to the government on the consistency of individual foreign investment applications with government policy. The board has no authority to take decisions to approve or reject foreign investment applications. It is for the Treasurer, the Assistant Treasurer and the government to make decisions on cases and policy....At the end of the day it is the Treasurer, the Assistant Treasurer or the government who makes that final decision as to whether or not [the proposed investment] should be allowed to proceed under the foreign investment policy. That is a very important part of foreign investment policy administration."[31]

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[28]This mistake comes from the misconception that the FIRB is a statutory body. Its involvement in the review of large and often controversial foreign investment applications have not helped to allay this impression. A close reading of the Senate Print Media Inquiry Report Ch 7 - 10 can only lead to the conclusion that this is an advisory body and the actual administration of the Australia's foreign investment policy is achieved through the FIB of Treasury.

[29]Senate Print Media Inquiry para 8.3, p193.

[30]First Assistant Secretary, Investment and Debt Division and Executive Member Foreign Investment Review Board.

[31]Senate Print Media Inquiry para 8.5, p194 - 5.

The FIRB is composed of four members. Three members come from either the business community or the community in general. The fourth member is the head of the FIB. He is referred to as 'the executive member' and is a First Assistant Secretary within the Department of Treasury. Australia's foreign investment policy is set out in the FAT Act, Ministerial statements and Departmental publications. However new policy or changes to old policy are generally communicated by press release.

The FIRB, being a non-statutory board, is not referred to in the FAT Act or any other legislation controlling foreign investment. This allows the FIRB to adopt informal processes for meetings. This has been done to enhance the free-flow of discussion and exchange of views.[32]

The processing of an application through the FIB review process is described in the accompanying chart (headed 'The FIRB process')[33]. There are matters in this chart which require comment.

The supply of commercial-in confidence information to the FIB in an application has meant that 'all information provided ... by foreign investors is treated in strict confidence'.[34] No details of this information are disclosed unless prior permission from the applicant is obtained. The FIB claims that in most normal applications the views of other relevant Commonwealth and State departments and agencies are obtained. These views plus those of the parties opposing the application or who are affected by the investment are forwarded to the Treasurer. It is unclear whether a rival domestic bidder is actually informed that a proposal is before the FIRB. The Senate Print Media Inquiry highlighted the fact that there appeared to be confusion within the FIB and the FIRB as to whether domestic bids should be reviewed along with foreign bids.[35] There is no reference to any procedure for confirming that there is a foreign applicant involved in the bidding or for a

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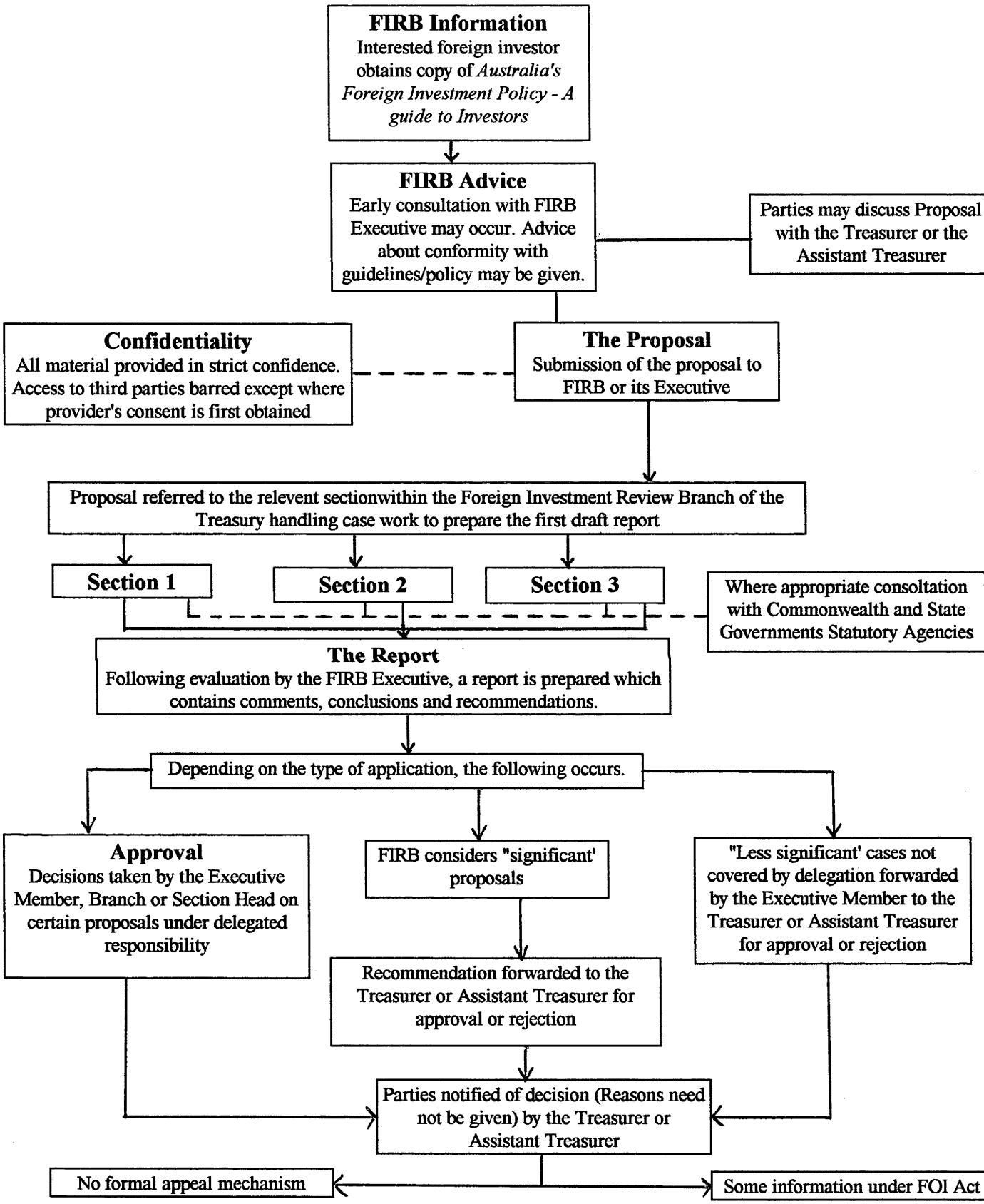
[32]Senate Print Media Inquiry para 8.13, p197: evidence of Mr T. Hinton to the Inquiry.
[33]Chart 8.1 Senate Print Media Inquiry p203.
[34]Senate Print Media Inquiry para 8.29, p201
[35]Senate Print Media Inquiry para 8.30 - 8.34, p201 - 204

The FIRB Process



domestic bidder to make enquires. Even quite simple enquires directed to the FIB are the subject of excessive secrecy. The evidence given by Mr P.A. Chadwick[36], representing the Communication Law Centre, to the Senate Print Media Inquiry exposes a typical response from the FIB:

> "What troubled us at times was that we would get answers like 'This is awkward and confidential and no, I cannot confirm or deny the existence of an application in this matter, notwithstanding that it is notorious in the press'."[37]

This excessive secrecy remains in place long after the information contained in the application has lost its commercial sensitivity.[38]

The reasons for the Treasurer's decision are not notified to the parties to an application. Parties to the application may seek reasons where a proposal is rejected or an explanation of the conditions imposed on the application. The FAT Act does not provide for any appeal from the decision of the Treasurer. The applicant may resubmit a modified application or resubmit on the basis of additional information, should the applicant wish to proceed further.[39]

Foreign investment applications are very rarely rejected. In 1994-95 4,815 applications were lodged with only 72 being rejected. Of those 72 rejections all but three were for applications for investment into the residential real estate sector.[40] Forty-seven applications were approved subject to conditions. The conditions imposed were in two main categories:

> "[T]hose designed to protect the environment, and those designed to protect the tax base by ensuring that agencies of foreign governments do not claim sovereign immunity in relation to Australian taxes and charges."[41]

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[36]Victorian Coordinator, Communications Law Centre: see List of Witnesses Senate Print Media Inquiry Appendices 17

[37]Senate Print Media Inquiry para 8.36, p205

[38]Senate Print Media Inquiry para 8.36 - 8.40, p205 - 206

[39]Senate Print Media Inquiry para 8.35, p204 - 205

[40]**Foreign Investment Review Board Report 1994 - 95**, AGPS, Canberra 1996 page 29. Eight divestiture orders were issued in this period.

[41]**Foreign Investment Review Board Report 1994 - 95**, AGPS, Canberra 1996 page 14

The FAT Act - Review By Outside Agencies

The FAT Act and its administrators have been subject to very little review by any outside agency[42]. There may be a number of reasons for this:

(1) The width of the discretion given to the Treasurer under the FAT Act by the phrase 'contrary to the national interest'.[43]

The Treasurer's discretion under the FAT Act appears unlimited. However, all discretions are subject to the limitations of the Act which creates the discretion. Deciding what is or is not in the national interest provides enormous latitude for determining which particular issues will and will not be taken into account in the decision making process. National economic issues are no doubt the most important determinants; however, issues such as the environment, employment, compliance with domestic anti-monopoly legislation and the perceived appropriate levels of Australian ownership are also relevant. Therefore, any applicant trying to fix the limits of the concept of national interest faces an almost impossible task.

Matters considered to be in the national interest are determined by the government from time to time. These matters are usually published by way of media release. The policy is stated in general terms, which makes the policy very fluid. Foreign business owners wishing to involve themselves in the Australian economy must comply with the terms of this policy. However the fluidity in policy allows for major applications for investment and acquisition to be judged on the merits of the application, and not just on compliance with an existing policy. The reasons for a constant review of national interest include shifting economic and political conditions which prevail at the time.

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[42]Senate Print Media Inquiry found that there had been no review of the practices of the FIRB through its whole existence. This even included the Australian Auditor General's Office. See Senate Print Media Inquiry paras 9.2 - 9.6 p 213 - 214

[43]The phrase "contrary to the national interest" is used throughout the FAT Act, as the test the Treasurer must apply to make a decision in relation to an application to acquire (see s18(2), s19(2), s20(2) s21(2) and s21A(2).) When divestiture of assets is required the same test is used (see s18(3), s19(3), s20(3), s21(3) and s21A(4)).

"Administration of policy is based on guidelines rather than inflexible rules."[44] The FAT Act is designed to allow the Treasurer to screen the flow of foreign investment into Australia. Successive Treasurers have regarded their discretion under the FAT Act as being one of a purely political nature.[45] The national interest test reflects successive Governments thinking in relation to foreign investment 'that foreign direct investment [is] typically of benefit to the recipient economy'.[46] Since foreign investment is perceived as a direct benefit to the Australian economy, Treasurers may be forgiven for thinking that they had a free hand to make decisions under the FAT Act. Foreign investment policy in Australia has always identified particular sectors of the economy for 'special consideration and specific rules'.[47] Changes to foreign investment policy have been made by administrative fiat rather than through legislation.[48]

(2) Perceived political or commercial implication of attempting to review or overturn the Treasurer's decision.

The commercial and political consequences of any challenge may be considerable. Commercially it could be disadvantageous to bring commercially sensitive material before a Court in judicial review proceedings. The proceedings may reveal the intended nature of the investment, proposed financing, anticipated market demographics and share and marketing strategies etc. Although confidential material can be protected in hearings, not all material may be able to be protected. Even the release of a small amount of sensitive material may be enough for a competitor to analyse the intended investment and develop

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[44]**Australia's Foreign Investment Policy: A Guide to Investors** AGPS Canberra 1992 - Statement of Treasurer John Dawkins p v.

[45]See **Australia's Foreign Investment Policy: A Guide to Investors** AGPS Canberra 1989 - Statement of Treasurer Paul Keating p v. **Australia's Foreign Investment Policy: A Guide to Investors** AGPS Canberra 1992- Statement of Treasurer John Dawkins p v. Statement of John Kerin, former Treasurer, to the Senate Print Media Inquiry para 3.173 p 88. The Senate Print Media Inquiry described the interpretation of the 'national interest' as some sort of " 'moveable feast' depending upon who occupies the Treasurer's chair."(para 3.174 p 89) The opinion of others who gave evidence to the Senate Print Media Inquiry appear in para 3.173 p 88 - 89

[46]Senate Print Media Inquiry para 7.22 p 179

[47]**Australia's Foreign Investment Policy, A Guide to Investors** AGPS, Canberra, 1992, p 6

[48]Senate Print Media Inquiry para 8.27

counter market strategies. The FIRB in its annual reports and before the Senate Print Media Inquiry has justified the strict confidentiality imposed on commercial material on the basis of the sensitivity of the material supplied and the need to maintain faith with the foreign investment review process.[49]

The time taken in getting a hearing where judicial review is sought may influence the applicants. The investment may lose its competitive edge if court action is required.

It may not be in the political interest of an applicant to challenge the decision of the Treasurer. The culture of secrecy which is associated with the administration of the FAT Act makes an applicant wary of possible bias against a future application. In order to maintain a relationship with the government and its officials, it may be preferable for an applicant not to oppose any decision of refusal or the imposition of conditions. Also the Treasury staff are unable, because of constraints on their numbers, to properly police compliance with conditions when they are imposed on an application.[50] This fact may influence an applicant to accept the conditions imposed but not comply with the conditions in the expectation that the compliance will never be monitored.

(3) The excessive secrecy which surrounds the administration of the FAT Act.

There is excessive secrecy surrounding both the administration of the foreign investment policy and the material supplied to the FIB with an application. If an applicant disputes the decision-making process, the applicant finds that there is very limited access to information on the processes relating to the application and the final decision.

(4) There are often no formal reasons given explaining why the application has been rejected or why certain conditions are imposed.

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[49]See **The Foreign Investment Review Board Report 1990 - 1991** AGPS Canberra 1992 p 8. The Senate Print Media Inquiry para 8.36

[50]In the **Foreign Investment Review Board Report 1994 - 95**, AGPS, Canberra 1996 at page 6 the Board noted a resolve to monitor the compliance of conditions especially in the residential real estate sector.

Reasons do not have to be given for a decision to reject an application. Although an applicant may seek reasons for rejection[51], the Treasurer's reasons for the decision do not have to be given to the applicant.

An applicant may also seek an explanation of the meaning of conditions which are attached to an approval. As the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act) does not apply to the FAT Act an applicant cannot obtain reasons by way of s13.[52] Compliance with the conditions imposed on an application is impossible to substantiate, as the conditions imposed are not publicly available. The FIB releases no information concerning compliance. Enforcement of divestiture orders relating to the purchase of urban land has occurred recently.[53]

(5) The involvement of FIB staff as facilitators of the application process.

FIB staff assist applicants to formulate their applications so that the applications conform to current government policy. This assistance precludes the situation where the applicant may be forced to challenge the Treasurer's decision.

(6) There is no formal appeal process.

No formal method of appeal from the decisions of the Treasurer exists. Review under s39B of the Judiciary Act 1903 is available; however, as later discussion in this work will show there are pitfalls.[54] An applicant, should he or she wish to proceed with the application, must withdraw the application and resubmit it so that it conforms with the policy requirements.

(7) Nobody has ever been dissatisfied with the decision of the Treasurer.

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[51]Evidence to the Senate Print Media Inquiry suggests that when an applicant seeks an explanation for the rejection of an application, an explanation is given. An explanation is also given of any conditions that are imposed. See Senate Print Media Inquiry para 8.35

[52]The FAT Act is listed in Schedule 1 of the AD(JR) Act as being an Act to which the AD(JR) Act does not apply.

[53]In the **Foreign Investment Review Board Report 1994 - 95**, AGPS, Canberra 1996 at page 29 the report notes that eight divestitures were ordered in the period to which the report applies. All the divestitures occured in the residential real estate sector.

[54]Australian Financial Review February 16 1994 - claimed that the only ground of review available to an applicant was error of law.

It is unlikely that this statement is true. There have been applicants who have not been satisfied with the Treasurer's decision. However, until the decision in Leisure & Entertainment Pty Ltd v Willis there had been no direct challenge to a decision of the Treasurer in the courts. Collateral action by the use of the Freedom of Information Act 1982 (Cth) (the FOI Act) had been the only form of action against the Treasurer's decisions. This is a very limited form of action.

It is also clear from the press and the evidence before the Senate Print Media Inquiry that not all the decisions of the Treasurer are satisfactory to those who may be affected by them including direct competitors, parties who could be affected by the takeovers and the community at large.

Inevitable Outcome: Disputes involving National Interest

The Senate Print Media Inquiry provided the first external review of the FIRB and of the Australian Government's foreign investment policy. The inquiry took as a specific term of reference the takeover of John Fairfax Ltd by the interests of Conrad Black. Findings in the report of the Senate Print Media Inquiry are used to provide examples of the workings of the FIRB when required later in this work. However, it must be remembered that takeovers in the media sector are not examinable under the FAT Act, but are still notifiable to the FIRB under government policy.[55] The FIRB minute of the 5th December 1991 prepared by Mr F.G.H. Pooley[56] provides some insight into the workings of the FIRB and the advice it might give to the Treasurer.

The history of this particular acquisition is as follows. The Fairfax Group went into receivership in December 1990. Three groups of investors tried to gain control of the Fairfax Group. The groups of investors were (1) INP Consortium Ltd: controlled via Independent Newspapers PLC by the O'Rerlly family of Ireland; (2) Tourang: a

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[55]**Australia's Foreign Investment Policy, A Guide to Investors** AGPS, Canberra, 1992, p 3
[56]Senate Print Media Inquiry Appendix G Appendices 77-91

consortium of Mr Kerry Packer's Consolidated Press (who later withdrew), Mr Conrad Black's Daily Telegraph (a Canadian national) and the USA based Hellman and Friedman Investment House; and (3) Australian Independent Newspapers Limited (AIN) a Melbourne based syndicate, backed by AMP, National Mutual and other local institutions.[57]

The FIRB minute reviews the two foreign proposals - (1) and (2) -making observations on the financial stability of the bid, holdings of each of the bidding companies, the structure of the bid, the ability of each bidder to complete the takeover and then maintain and run the Fairfax Group. The foreign investment policy in relation to takeovers in the print media is then set out. Reference is made here to the fact that all applications are to be judged on a case by case basis. The minute highlights the political implications of the policy by noting that caucus requires a limit of 20 per cent foreign ownership of local newspapers. There is a clear political will to keep foreign ownership in newspapers below 20 per cent. The question of foreign control was seen as being of crucial importance.[58]

The FIRB minute draws a distinction between the literal legal effect of the transaction, where there is still less than the required shareholdings to have foreign control, and the actual commercial effect of the decision, where actual control passes to the foreign interest. The minute reads:

> "Both bids are examinable under the Act and could be blocked under the Act were you to decide that the control of Fairfax would pass to foreign hands (essentially Dr O'Reilly or Mr Black), and that this would be contrary to the national interest. If you were predisposed to reject either bid, the question of 'foreign control' assumes crucial importance".[59]

The FIRB minute shows that consultations took place between interested government agencies. In this instance the Trade Practices Commission was consulted

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[57]Senate Print Media Inquiry Appendix G Appendices 79
[58]Senate Print Media Inquiry Appendix G Appendices 79-83
[59]Senate Print Media Inquiry Appendix G Appendices 84

about its interest in Mr Packer. The involvement of Mr Packer was seen to raise national interest questions relating to the concentration of media ownership and the cross media ownership rules. Other issues raised were editorial independence, management style, the continued maintenance of the Fairfax group and the likely effect on media concentration in Australia.[60]

The "Options" section of the FIRB minute is the only section that contains any comment on the domestic bidder AIN. The AIN bid was seen to be undesirable as AIN had limited experience in the management of newspapers. The management skills that were available to the two foreign bidders were expected to make the Fairfax press more competitive. The FIRB can be seen to be promoting the case for the creditors of Fairfax who might lose repayments because of the lowered value of the bid of AIN if the two foreign bidders were stopped from bidding.[61]

The FIRB summarised its position in relation to the bids as:

> "Both bids would bring a new major player (replacing the Fairfax family) and valuable newspaper expertise to the Australian media. While there is some community concern about foreign ownership of local newspapers per se, each bid is consistent with the key proposition of the Caucus resolution, and would at least maintain the existing degree of competition and diversity."[62]

The two foreign bidders are said to have complied with caucus policy. The FIRB interpreted caucus policy to be a 20 per cent limit on the level of foreign voting equity. Any extension of the level of foreign voting equity beyond the 20 per cent level was unacceptable to caucus, however the FIRB only saw this as a desirable objective.[63] It is interesting to note that Caucus policy is mentioned far more frequently than is government policy. This may be a reflection of the political reality of the time.[64]

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[60]Senate Print Media Inquiry Appendix G Appendices 85-86

[61]Senate Print Media Inquiry Appendix G Appendices 86-87

[62]Senate Print Media Inquiry Appendix G Appendices 87.

[63]Senate Print Media Inquiry Appendix G Appendices 84

[64]Senate Print Media Inquiry Appendix G Appendices 87. Throughout the minute reference is made to caucus policy. This may reflect the importance the backbench of the Labor Party had exerted on Government media policy up until the time of the takeover by Conrad Black

The conclusions and recommendations section also highlights precautions taken by the FIRB to provide the Treasurer with advice that would avoid any challenges to his decision:

> "If you reject both bids, we would need to discuss with you whether this should be done under the Act or the policy guidelines (we cannot predict whether the parties would challenge a rejection under the Act in court: they would claim you were mistaken in concluding control would be foreign, and your decision was wrongly based; you would need to show control would be foreign and against the national interest)".[65]

The conclusions and recommendations section reviews the proposals in the light of their economic impact on the nation. In this case two board members advised rejection on the basis that effective control of the Fairfax Group would go to foreigners. The other two members recommended the bids be accepted because there would be more expertise brought to management, better quality journalism and more modern technology as a result of the acceptance of the bids.

This minute is enlightening as it shows the type of advice which is tendered to the Treasurer. It is clear that the Treasurer's decision is his alone to make. It is also clear that the FIRB examines applications after collecting information from a variety of sources. The minute also highlights the 'one off' nature of each application.

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[65]Senate Print Media Inquiry Appendix G Appendices 88- The implication of this distinction is not altogether clear. **Australia's Foreign Investment Policy, A Guide to Investors** states at p 7 that all takeovers in the media are subject to review but are not subject to the operation of the FAT Act. This means that all applications are going to be reviewed in line with Government policy. The FAT Act would exclude some transactions as they would fall below the thresholds established by the FAT Act. Those transactions which are within the terms of the FAT Act would be subject to the strictures of the FAT Act.

Chapter 2

Review of the Foreign Acquisitions and Takeovers Act

The FAT Act: A Short Analysis.

As the name suggests the Foreign Acquisitions and Takeovers Act regulates the acquisition or takeover of corporations and businesses in Australia by persons designated as 'foreign persons' or by foreign corporations. This section is designed to give the reader an overview of:

1. the workings of the FAT Act; and
2. the effect on persons and corporations subject to the provisions of the FAT Act.

The FAT Act is intricate in its workings and its applications. However, there has been limited litigation of the provisions of the FAT Act.[66] It must also be noted that applications to the Treasurer for a determination under the FAT Act are very rarely rejected.[67]

The FAT Act is divided into three parts:

(1) Preliminary: This part defines the terms used in the operative part of the FAT Act (s1 - s17);

(2) Control of Takeovers and Other Transactions: This is the operative part of the FAT Act and sets out those transactions which will be subject to the provisions of the Act (s18 - s28);

(3) Miscellaneous: This part deals with the ancillary matters, eg offences, criminal defences and anti-avoidance provisions (s30 - s39).

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[66]Litigation of the provisions of the FAT Act has never been directly related to the meaning of specific provisions of the Act. Leisure & Entertainment Pty Ltd v Willis No QG 204 of 1995 was the first atttempt at a direct challenge to a decision of the Treasurer.

[67]See discussion on page 9

The provisions of the FAT Act target five types of transaction:

a. Acquisitions or Takeovers by acquisition of shares - s18;

b. Acquisition of assets - s19;

c. Arrangements relating to directorates of corporations - s20;

d. Arrangements relating to the control of an Australian business - s21; and

e. Acquisitions of an interest in Australian urban land - s21A.

Section 18: An example of the workings of the FAT Act.

Section 18(2) empowers the Treasurer to prohibit the acquisition of shares, proposals to acquire shares and proposals to issue shares in certain circumstances. The Treasurer may exercise his power where a corporation, although not controlled by a foreign person, would, as a consequence of the proposal, be controlled by a foreign person.[68] Section 18 applies to the following parties:

(i) the corporation whose shares it is proposed to acquire or are being acquired;

(ii) the person who proposes to acquire the shares; and

(iii) the foreign person, who as a result of the proposed acquisition would control the corporation.

Further comment is required on certain aspects of s18:

Proposals to acquire shares: This applies to the acquisition of shares, proposals to acquire shares and a corporation preparing to issue shares.[69] A person proposing to acquire

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[68] The Treasurer may, where a corporation is already controlled by a foreign person or persons and the corporation would continue to be controlled by foreign persons, and there is an alteration in the ownership or control of the corporation by including a person who is not already a person in control or excluding a person already in control, treat this change as if it were an acquisition under s18(2).

[69] A person proposing to acquire shares or assets is defined in s5(3) as:

(*i*) a person making an offer;

(*ii*) a person making or publishing a statement that in anyway invites a holder of shares or assets to dispose of them;

(*iii*) a person taking part in or proposing to take part in negotiations with a view to acquisition of shares and assets.

shares includes a person making an offer, persons inviting shareholders to dispose of assets and people taking part in or proposing to take part in negotiations to purchase shares. Therefore the number of transactions that s18 can apply to is considerable.

Corporations: For a corporation to come within the terms of s18 it must be a prescribed corporation that carries on an Australian business or be a holding corporation. A prescribed corporation is defined as a (i) a trading corporation; (ii) a financial corporation; (iii) a corporation incorporated under Territory laws; or (iv) a foreign corporation restricted by the terms of s13(d),(e),(f),(g)&(h).[70]

Although the corporation may be a prescribed corporation it may also be an exempt corporation.[71] For a company to be an exempt corporation it must first be a prescribed company with Australian assets where the total of those assets does not exceed $5 million or if more than 50 per cent of the assets is attributable to Australian rural land the threshold is reduced to $3 million.[72] The term Australian business refers to a business carried on in Australia for profit or gain.[73] Any one who holds a mineral right in Australia is deemed to be carrying on a business in Australia.[74] However, conducting business with a government or a corporation constituted for a public purpose is deemed not to be carrying on a business under the FAT Act.[75]

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[70]These subsections cover foreign corporations which have:
(1) assets of more than $20 million which consist of all or part of any
(a) land situated in Australia (both legal and equitable title),
(b) mineral rights,
(c) shares in corporations incorporated in Australia;
(2) a foreign corporation which has Australian subsidiaries where the consolidated assets are more than $20 million;
(3) a foreign corporation which has a subsidiary which is also foreign and which holds assets referred to in (1)(a) - (c);
(4) a foreign corporation with or without Australian subsidiaries where the consolidated assets are not less than one half the value of the consolidated assets of the foreign corporation (and its subsidiaries, if any).

[71]FAT Act s13A

[72]FAT Act s13A(4)

[73]FAT Act s7(1)

[74]FAT Act s7(2)

[75]FAT Act s7(3)

Foreign Persons: A natural person who is not ordinarily resident in Australia for less than 200 days in the 12 months preceding the application is defined as being a foreign person.[76] Where the foreign person is a corporation other factors apply. For a corporation to be controlled by a foreign person, the natural person must not be ordinarily resident in Australia and, the person, in company with associates,[77] must control 15% or more of the issued shares or voting rights of the corporation.[78] The Treasurer is able to trace through the corporate structure to determine the true owners or controllers of the corporation and to determine the level of control or voting power exercised by those people.[79]

> Section 18(2) of the FAT Act reads as follows:
> (2) Where the Treasurer is satisfied that-
> (a) a person proposes, or persons propose, to acquire shares in a corporation or a corporation proposes to issue shares;
> (b) the proposed acquisition or acquisitions or the proposed issue would have the result that -
> (i) in the case of a corporation not controlled by foreign persons - the corporation would be controlled by foreign persons; or
> (ii) in the case of a corporation controlled by foreign persons - the corporation would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and
> (c) that result would be contrary to the national interest,
> the Treasurer may make an order prohibiting the proposed acquisition of all or any of the proposed acquisitions, or the proposed issue, as the case may be.

If the transaction is one that is controlled by the FAT Act the Treasurer must now determine whether the acquisition is "contrary to the national interest".[80] There is no definition of "contrary to the national interest" in the FAT Act to assist the Treasurer.

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[76]FAT Act s5 and s5A

[77]FAT Act s6 defines who are associates

[78]If there are two or more natural persons then they must control an aggregate of more than 40% of the voting rights or issued shares. A controlling interest is defined as a substantial interest in the case of a single person (FAT Act s9(1)) or an aggregate substantial interest in the case of two or more foreign persons (FAT Act s9(2)).

[79]FAT Act s12C

[80]FAT Act s18(2)(c)

There are three options open to the Treasurer: (1) to allow the transaction to proceed; (2) to allow the transaction to proceed with conditions; or (3) to prohibit the transaction.[81] If the Treasurer prohibits the transaction he is empowered, should it be required, to order 'specified foreign persons', either alone or in company, not to hold an interest in shares or in voting rights in a greater proportion than when the s18(2) order became operative.[82]

If the sale and transfer of the shares has been completed the Treasurer is permitted to order the forced disposal of shares.[83] The Treasurer must satisfy himself that the sale and transfer is contrary to the national interest. The Treasurer is to specify in writing the time by which the disposal is to take place. Extensions of time may be given. The Treasurer may not refuse to approve a person acquiring the shares from a forced disposal, unless such a transaction would be contrary to the national interest.[84]

Sections 25 and 26. These are the notification sections and both effect s18 decisions.

Section 26 relates only to s18 transactions and makes it compulsory for an applicant to notify the Treasurer of the intention to enter an agreement to acquire shares. Failure to inform the Treasurer of an intention to enter into an agreement creates an offence.[85] Section 26 applies to 'specific persons' viz:

(i) natural persons not ordinarily resident in Australia;

(ii) a corporation in which an Australian person not ordinarily resident has a controlling interest; and

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[81]See Re Macphee and Department of Treasury (1989) 11 AAR 166, 178 where Hartigan J found that (1) may not be open to the Treasurer. This may have been true in a strict legal based on the legislation as it was written at the time. However, the practical effect of the decision is that it allows the application to proceed.

[82]FAT Act s18(3). This order may also apply to any associates.

[83]FAT Act s18(4)

[84]FAT Act s18(5)

[85]FAT Act s26(2)(a)

(iii) a Trustee of a trust estate where a substantial interest in the estate is held by a foreign person.[86]

A further, but separate offence is created, even though notice has been given, if a person proceeds with the agreement before advice is given that the Commonwealth Government has no objection.[87] The offence is not formed if the agreement is subject to a condition precedent.[88]

Two points should be noted about s26:

(a) it does apply to Australian corporations viz trading, financial or Territory corporations. Section 18 applies to prescribed corporations as defined in s13. Therefore a smaller group of corporations is affected by the compulsory notifications; and

(b) it does not apply to pro rata rights issues or to the target company if it is an exempt corporation.

Section 25 applies to a notice given voluntarily in relation to all transactions subject to the provisions of the FAT Act.[89] This section is directed at the Treasurer and, should an applicant voluntarily notify the Treasurer of his intention to acquire shares the Treasurer is subject to certain obligations and time limits to which he must adhere. First, a preliminary examination is to be completed within 30 days[90] and can result in (a) a quick clearance or (b) an interim order prohibiting implementation of the proposal for up to 40 days from the date of the order. Second, a detailed investigation will follow an interim order subject to s25(3). If a detailed investigation is required the Treasurer has up to 90 days in which to make a decision.[91] Should the Treasurer fail to inform an applicant of his decision this will restrain the Treasurer from making any further orders prohibiting actions

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[86]FAT Act s26(1)
[87]FAT Act s26(2)(b)
[88]FAT Act s26(3)
[89]FAT Act s25(1)
[90]FAT Act s25(2) and (3)
[91]FAT Act s25(3)

taken under relevant provisions[92] in relation to the transaction. The applicant is restrained from proceeding further with the transaction until such time as the Treasurer communicates his decision or the time for the Treasurer to make his decision has elapsed.[93]

The Treasurer may consent to the transaction and may do so with or without conditions.[94] These conditions are to be such that the proposal will not be contrary to the national interest. Failure to comply with the conditions is an offence.[95] Should a person or a corporation be convicted of an offence, the Treasurer is entitled to order divestiture of the shares.[96] The Treasurer may not order divestiture at a later date, if no conditions have been imposed or the conditions imposed have been fulfilled.

The other operative provisions, s19, s20, s21 and s21A, are all of a similar structure to s18. The Treasurer is able to order the divestiture of assets,[97] the rearrangement of the constituent documents[98] and the control of a business to be returned as far as is possible to Australian ownership.[99] Voluntary notification of an intention to do one of the acts referred to in sections 19, 20 and 21 may save the applicant from the prospect of having an order prohibiting the transaction.[100] There are no compulsory notification provisions in relation to sections 19, 20 and 21.

Section 21A deals with applications for the purchase of urban land. Urban land is land not directly used in primary production.[101] It is compulsory to notify the Treasurer of any intention to purchase urban land.[102] Failure to notify constitutes an offence under the

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[92]As FAT Act s25 applies to s18(2), s19(2), s20(2), s21(2) and s21A(2) relevant provisions refers to any order made in relation to of these sections. It also refers to s25(1A) conditional orders.
[93]FAT Act s25(2) and (3). Failure to comply may result in a criminal prosecution.
[94]FAT Act s25(1A)
[95]FAT Act s25(1C)
[96]FAT Act s25(1C)(d)
[97]FAT Act s19(2)
[98]FAT Act s20(2)
[99]FAT Act s21(2)
[100]FAT Act s25(1)
[101]FAT Act s5
[102]FAT Act s26A

FAT Act.[103] The regulations set out a large number of transactions for the purchase of urban land that are exempt from review.[104]

The FAT Act requires that the following proposals be submitted for review:

(i) acquisitions of interests in urban real estate regardless of value...;
(ii) acquisitions of shareholdings of 15 per cent or more in Australian companies that have total assets valued at more than $5 million (more than $3 million if greater than 50 per cent of the assets of the company are in the form of rural land);
(iii) takeovers of Australian companies and businesses by means other than the acquisition of shares, viz:
    (a) by the purchase of assets or interests in assets;
    (b) by agreements in relation to board representation or by alteration of the articles of association or other constituent documents of a company; or
    (c) by arrangements for leasing, hiring, managing or otherwise participating in the profits of a business-

where the total assets of the target company or business are valued at more than $5 million (more than $3 million if greater than 50 per cent of the assets are in the form of rural land); and
(iv) takeovers of off-shore companies that have Australian subsidiaries or assets valued at $20 million or more, or where the value of the Australian subsidiaries or assets is more than half of the value of the global assets of the target company.[105]

There are other proposals which are submitted to the Treasurer for his consideration, however, these proposals are not subject to the provisions of the FAT Act. Such proposals fall into the following categories:

(i) any proposals in the media sector irrespective of size;
(ii) proposals to establish new business in other sectors of the economy where the total amount of the investment is $10 million or more (total investment means the total expenditure expected to be associated with the proposal, including the value of any assets leased); and
(iii) direct investment by foreign governments or their agencies, regardless of size, (excluding investments related to their diplomatic representation).[106]

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[103]FAT Act s26A(2)
[104]Foreign Acquisitions And Takeovers Regulations reg 3
[105]Australia's Foreign Investment Policy, p2
[106]Australia's Foreign Investment Policy, p3

Government policy allows for certain proposals not to be examined or required to comply with the national interest criteria. These proposals fall into the following categories:

(a) the acquisition of 15 per cent or more of a company or a business valued by total assets and consideration below $50 million;

(b) the establishment of a new project or business with a total investment below $50 million; and

(c) the takeover of an off-shore company with Australian subsidiaries or assets valued below $50 million and not exceeding half the global asset value.[107]

[107] Australia's Foreign Investment Policy, p4

Chapter 3

Obtaining Information From the FIRB

Effective external review depends on the person who seeks the review being able to obtain information about the process of the making of a particular decision. Apart from discovery[108], there are two possible ways to obtain information from the FIRB. The first is by the common law and the second by application for information under the Freedom of Information Act.

The Common Law

An attempt was made by Kirby P in the New South Wales Court of Appeal to establish a common law duty on administrators to give reasons.[109] This was rejected by the High Court in Public Service Board Of New South Wales v Osmond.[110] The Court found that there was no general rule of common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests or defeat the legitimate expectations of those who are the subject of the decision.[111]

Freedom of Information Act

The Freedom of Information Act (the FOI Act) creates a legally enforceable right to obtain access to documents from Government agencies.[112] The FIB of Treasury and the FIRB are agencies for the purposes of the FOI Act.[113] Therefore the FIRB is susceptible to an application for access to a document in its possession. (For the purposes of this

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[108]Discovery is not considered further as it only applies to obtaining information after an action has been commenced. This limits the effectiveness of discovery.
[109]Public Service Board of New South Wales v Osmond [1984] 3 NSWLR 447
[110] (1986) 63 ALR 559
[111]Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, 662 - 3 per Gibbs CJ
[112]FOI Act s11; this includes the official documents of Ministers
[113]FOI Act s4: Agency means a Department, prescribed authority ... as defined.

section of the work FIRB refers to both the FIRB and the FIB of Treasury unless otherwise stated.)

Section 11 creates a legally enforceable right to obtain access to documents of an agency that are not exempt documents. Part IV of the FOI Act sets out the provisions that relate to exempt documents. The decided cases reveal that the FIRB has succeeded and continues to use all the available exemptions to withhold documents.

Section 7 exempts a number of agencies from applications to access of the agencies documents. These agencies are listed in Schedule 2. The FIRB is not listed and is therefore not exempt. The FIRB has, however, attempted to claim that a total exemption is applicable to all documents in its possession. In Re Lordsvale Finance and Department of Treasury No3, Deputy President Todd put an end to such a claim.[114] It is not for the Administrative Appeals Tribunal (the AAT) or the Courts to give an exemption which the Parliament has not given.[115] If a document is exempt, then an exemption must be found within the provisions of the FOI Act. Any document that does not attract one of the exemptions is susceptible to release.

The exemption in s36 has figured prominently in the decisions concerning the FIRB. This section exempts from release any document that the FIRB can establish contains advice, opinion or recommendations obtained or prepared as part of the deliberative processes of the FIRB[116], where, in relation to the document its disclosure would not be in the public interest.[117] The exemption does not apply to "purely factual

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[114](1986 - 87) 12 ALD 445 The claim for total exemption was made in submissions in relation to s58(5) of the FOI Act: namely whether "there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest".

[115](1986 - 87) 12 ALD 445 para 4 "I do not think it is proper for this Tribunal, under the umbrella of the "public interest", to uphold blanket claims of exemption for all documents in the possession of certain agencies without reference to the contents, or to the nature of the contents, of those documents. To do this would be tantamount to the Tribunal conferring upon an agency, or in this case a section thereof, the immunity afforded by Schedule 2 despite Parliament not having seen fit to do so. The Tribunal is not the Legislature and it must resist the temptation to expedient to cure perceived or suggested defects or omissions in legislation."

[116]FOI Act s36(1)(a)

[117]The onus remains on the FIRB to show that the document is one exempted by s36(1)(a). FOI Act s61.

material" contained in a document[118], nor does it apply to a formal statement of the reasons for a decision[119] or a record of a final decision.[120] Section 36(1)(a) protects from disclosure documents which were prepared in the process of arriving at a decision.

The FIRB prepares a memorandum of advice for the Treasurer on each application. These memoranda set out the opinion of the FIRB on the merits of each application. At the end of the memorandum the Treasurer is asked to accept or reject the proposal.[121] It would seem that the memorandum prepared by the FIRB and forwarded to the Treasurer for approval may form part of the decision. Therefore, an applicant for access to information may be entitled to obtain the conditions imposed on an applicant to invest, as the conditions may form part of the final decision.[122]

In Re Macphee and Department of Treasury[123], Hartigan J was asked to release the FIRB memorandum to the Treasurer in relation to the takeover of the Herald and Weekly Times Newspapers by News Corporation. In one part the opinion of the AAT rests on the interpretation of the words 'final decision' in s36(6)(c). Hartigan J found that the Treasurer only has power to make an order prohibiting the acquisition or issue of shares. As a consequence the Treasurer could not make a decision accepting the application to acquire or invest. This part of the decision must turn on the facts and the statute as it was written at the time. Prior to 1989 there was no statutory provision permitting the imposition of conditions. Section 25(1)(A) of the FAT Act specifically refers to the imposition of conditions and also suggests that the Treasurer must make a decision as "the Treasurer may ... decide that the Commonwealth Government has no objection". In s26(2)(b)(ii) of the FAT Act reference is made to "the date on which advice

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[118]FOI Act s36(5)
[119]FOI Act s 36(6)(c)
[120]FOI Act s 36(6) (c)
[121]See Senate Print Media Inquiry Appendix G Appendices 88
[122]FAT Act s24 The FAT Act requires that where the Treasurer makes an order, it must be in writing signed by him and publish in the Gazette within ten days of being signed to be a valid order.
[123](1989) 11AAR 166

is given that the Commonwealth Government does not object to the person entering into the agreement (whether or not the advice is subject to conditions imposed under sub-section s25(1)(A))". These current provisions suggest that the Treasurer or his delegate must make a decision.

Although Hartigan J was not convinced that the acceptance of an application to acquire was a decision that the Treasurer could make, he assumed that, if the Treasurer could make such a decision, the decision noted at the end of the memorandum was a decision that included all of the reasons contained in the memorandum. The question then is: is this a final decision and therefore is the document susceptible to release by virtue of s36(6)(c)? Hartigan J found that any document that contains a decision where a condition is imposed is not a final decision for the purposes of the FOI Act. This is not a final decision because further decisions might be made if any of the conditions imposed are not fulfilled. This may be a reflection of the legislation at the time. However to say that the decision is not final would be unrealistic. The decision is final between the parties. Both the parties agree that the investment or acquisition may proceed. Compliance is a separate issue from whether a decision is final. If the application to acquire or invest does not comply with the conditions imposed, the Treasurer has remedies under the FAT Act.

The second limb of a s36 exemption is the disclosure of the document being contrary to the public interest. The FIRB has put forward a number of general arguments to support its claim for exemption on this basis. The analysis that follows will include other possible exemption claims.

(1). It is argued that documents in the possession of the FIRB are generated by a statutory authority which reports direct to the Treasurer. The FIRB is an advisory body which gives sensitive advice to the Treasurer involving foreign investment. But the AAT has said that, although the FIRB gives sensitive advice to a high level of government, this

does not of itself make the disclosure of information, contrary to the public interest.[124] This argument is a material factor but not a conclusive argument. The AAT weighs the right of the public to access to information as guaranteed by the FOI Act against right of the Government to obtain advice and consider matters in secret.[125]

(2). It is said that there is a need to protect information which is supplied voluntarily and confidentially by commercial organisations. The FIRB gives assurances that the information with which it is supplied will be protected. These assurances are given in the belief that there will be a more free and frank flow of information so that the information can receive proper and candid consideration. Again, when deciding whether the document should be released this is a material, but not a conclusive, factor.[126] Apart from s36, exemption from release of documents relating to business affairs is available under s43. The FIRB may claim the exemption without reference to the supplier of the information. However where the FIRB intends to grant access to the document it must take reasonable steps to provide the owner of the information with the opportunity to make submissions for the document to be exempt under s43.[127]

It should also be noted that information which is given in confidence is also exempt[128], although a document which is prepared by a Minister or the staff of a Minister cannot be exempted under this section.[129] Information given by an outside source is protected if it were regarded as breach of confidence.[130] Evidence from those who gave the information in confidence which is contained in a document which was given in

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[124]Re Lordsvale Finance and Department of Treasury No3 (1986 - 87) 12 ALD 445 para 5 Deputy President Todd said: " I do not consider that the fact that a document emanates from, or is directed to, a very senior official or a Minister can of itself make its disclosure contrary to the public interest. This is not how the Act works."

[125]FOI Act s34 On the other hand documents that are supplied to Cabinet for consideration may be exempt under s34

[126]Re Lordsvale Finance and Department of Treasury No3 (1986 - 87) 12 ALD 445 at para 6

[127]FOI Act s27

[128]FOI Act s45

[129]FOI Act s45(2)

[130]FOI Act s45(1)

confidence and under the expectation of continuing confidentiality, may result in the non-disclosure of the document.

(3). It may also be argued as a s36(1)(b) factor that disclosure would prejudice the flow of information between government departments, both Federal and State, and the flow of information between Federal and State Agencies. This argument can also support a claim under s33A(1)(a) that documents may be exempt if they were to cause damage to the relations between the Commonwealth and an individual State.[131] An exemption may also be claimed under s33A(1)(b) in relation to information communicated in confidence between the Government of a State and an authority of a State to the Commonwealth.[132] These exemptions are highly relevant but the prejudice to the flow of information must be established. These exemptions cannot be claimed on the unsubstantiated opinion of a public servant or a Minister as to what may occur. A Minister must be satisfied there would be damage to the relations with the State.[133] A ministerial certificate may also be issued to support this exemption.[134]

(4). The FIRB also cite s36(1)(b) as an argument that people will not be candid if any of the information supplied to the FIRB is ever to be released. Deputy President Todd accepted the argument that, an agency cannot be expected to operate properly if information could not be received candidly from people.[135] The release of a document cannot be restrained because of the slight possibility that a person supplying that information will not be candid. The purpose of the FOI Act is to allow people access to government and bureaucratic decision-making. A clear reduction in candid information is a material argument against release, but, again it is not conclusive argument that the release is not in the public interest.

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[131]FOI Act s33A(1)(a)
[132]FOI Act s33A(1)(b)
[133]Re Lordsvale Finance and Department of Treasury No3 (1986 - 87) 12 ALD 445 at para 3
[134]FOI Act s33A(2)
[135]Re Lordsvale Finance and Department of Treasury No3 (1986 - 87) 12 ALD 445 at para 3

The Treasurer may issue a conclusive certificate to support claims of exemption under s36 (and under s33, s33A, s34 and s35). A certificate establishes conclusively that the disclosure of the document is not in the public interest under s36(1)(b).[136] Section 58(5) of the FOI Act confers a power on the AAT to review the reasonableness of certificates issued pursuant to s36(3). The certificate only applies to a document which is of a kind stated in s36(1)(a). There is a two part process to establish the reasonableness of the certificate. The FIRB must establish the validity of the grounds upon which it bases its claim for exemption, and, then, that the grounds are reasonable, that is, that the grounds are not fanciful, imaginary or contrived, but are grounds which are based on reason.[137] The grounds which are argued by the FIRB are to be judged by themselves and live and die by themselves. They are not to be measured against competing grounds.[138] The onus to prove that grounds are reasonable rests with the FIRB. The FIRB cannot simply rely on the grounds which are stated in the certificate when required to prove them. The FIRB must show the AAT that the grounds stated in the certificate are both true and reasonable.[139] Each case is determined on its own facts.

An FOI application might appear to be a tool to obtain information from the FIRB, but the FIRB has been successful in restricting the release of information in its possession. The 1992 - 93 Annual Report of the FIRB shows that fourteen FOI applications were made. The FIRB was obliged to make a full release of information requested in three cases and a partial release was made in relation to six requests. This release of information was done in consultation with those who supplied the information.[140] The 1994 - 95 Annual Report shows that five FOI applications were received. None of these applications resulted in a full release of the documents requested. Partial release was made in respect of

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[136]FOI Act s36(3)
[137]Department of Industrial Relations v Burchill (1991) 33 FCR 122, 125
[138]Re Macphee and Department of Treasury (1989) 11 AAR 166, 173 - 174 per Hartigan J
[139]Re Macphee and Department of Treasury (1989) 11 AAR 166, 174
[140]**Foreign Investment Review Board: Report 1992 - 93** AGPS Canberra 1993 page 3

three requests.[141] The FIRB maintains that no commercially sensitive or confidential documents has ever been released to any FOI applicants.[142]

[141]**Foreign Investment Review Board: Report 1994 - 95** AGPS Canberra 1996 page 6
[142]**Foreign Investment Review Board: Report 1992 - 93** AGPS Canberra 1993 page 3 and **Foreign Investment Review Board: Report 1994 - 95** AGPS Canberra 1996 page 6

Chapter 4

The FAT Act and Judicial Review

Introduction

The only person authorised by the FAT Act to make a decision is the Treasurer.[143] Section 75(v) of The Constitution gives original jurisdiction to the High Court "[i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." Section 39B of the Judiciary Act 1903 gives original jurisdiction to the Federal Court of Australia in respect of the same matters. A Minister is an officer of the Commonwealth.[144] The Treasurer being a Minister is therefore an officer of the Commonwealth. The Treasurer's decisions are therefore susceptible to judicial review. Decisions of the Treasurer made pursuant to the FAT Act are listed in para(h) of schedule 1 of the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act) as being one of the class of decisions to which the AD(JR) Act does not apply. Therefore any person wishing to challenge the decision of the Treasurer must use the s39B procedures or, as they are more commonly referred to, the prerogative writs or orders.

A Minister must use the power of discretion to promote Parliament's purpose.[145]It is now established that a Minister's statutory discretion is able to be reviewed on all available judicial review grounds.

Judicial review is the only external avenue of challenge open to a person dissatisfied with the decision of the Treasurer. Judicial review does not provide the applicant with a review of the merits of the application. It is not an appeal. Judicial review is a review of the decision-making process. The issues raised in this chapter and the

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[143]The Treasurer is not the only person who makes decisions in relation to the Act. The Treasurer reviews all applications where the value of the acquisition is above $50 million. The Assistant Treasurer reviews all applications for acquisition below $50 million. The Executive Member reviews all decisions that deal with the purchase of urban real estate.[source Senate Print Media Inquiry paras 8.4 and 8.5,p 194]

[144]Quick and Garren **The Annotated Constitution of the Australian Commonwealth** (1901),p.783

[145]Minister for Aboriginal Affairs v Peko Wallsend (1986) 162 CLR 24

succeeding chapters are relevant to both a direct and a collateral attack on the decision of the Treasurer.

Litigants who seek a public law remedy must establish four essential requisites before they will be granted the remedy they seek. The litigant must show that he or she :

1. is a litigant with standing;
2. has a justiciable matter to litigate;
3. can establish one of the grounds of review; and
4 is entitled to the remedy that he or she seeks.

The remedies of greatest utility, given that they are relatively free of technicalities are the injunction and the declaration. If on an application for either or both of these remedies a person aggrieved can establish the first three requisites listed, there is not likely to be any great difficulty in the Court granting the remedy. A Court may decline these remedies in its discretion, but relevant factors in this context are likely to have been addressed in relation to the topic of justiciabilty. (For reasons of space this topic is not further addressed.)

Chapter 5

Judicial Review - Standing

The FAT Act includes no provisions for an appeal. Discussion has already shown the difficulty of obtaining information by an FOI application or by the common law action for release of information. However, it is assumed that the prospective litigant has sufficient information concerning the decision-making process to bring the action. The litigant must therefore show that he or she has the standing to bring an action.

The rules of standing are varied and are dependent upon the remedy being sought. In recent years the Courts seem to have moved closer to a unified test of standing based on the 'special interest' test.[146] The 'special interest' test was first adopted for the equitable remedies of injunction and declaration.[147] This test is now being adopted for the remedies of certiorari, prohibition and mandamus. The object of these rules is twofold: first, to limit the number of people who can come before the Courts to enforce public rights and duties and prohibit public wrongs; second, to have the person most affected by the unlawful administrative action before the court.[148]

The special interest test is a refinement of the traditional rules governing standing in relation to injunction and declaration. The traditional rule was that the individual had no

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[146]**The Laws of Australia**: Administrative Law - Vol 2 Standing p33 para 45 The author, Merris Amos, claims that "There has been a movement towards the 'special interest" test for all remedies". Amos concludes that the decisions concerning s3(4) of the AD(JR) Act 1977 "may influence the common law standing tests. This test may supersede the common law and become the standard test for standing." In Leisure & Entertainment Pty Ltd v Willis No QG 204 of 1995 Spender J dismissed a claim for an interlocutory injunction because there was no chance of obtaining standing in the principal action where mandamus and injunction were sought. Spender J dealt with standing for both remedies by using the "special interest" test.

[147]Australian Conservation Foundation Inc v Commonwealth [1980] 146 CLR 493, 527 per Gibbs J

[148]The Australian courts have rejected the concept of an open system of standing: see Australian Conservation Foundation Inc v Commonwealth [1980] 146 CLR 493 which was affirmed and followed in North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617, 627 and Right to Life Association (NSW) Inc v Secretary, Dept of Human Services and Health (1995) 128 ALR 238, 254

standing to seek to enforce a public legal right, or require the performance of a public duty, or to act to prohibit a public wrong. The only person entitled to bring these matters before the Courts is the Attorney-General. The Attorney-General may proceed either *ex officio* or at the relation of a private citizen. The relator action gives standing to the person prosecuting the action.[149]

There are two exceptions to this rule, which were set out by Buckley J in Boyce v Paddington Borough Council:[150]

> "A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ..... and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

The right of a private individual to standing is certain where that person can show interference with his private right at the same time as the public right. An individual whose private legal rights, having their source in contract, tort or statute, are affected by unlawful administrative action has standing to seek injunction or declaration.[151]

Beyond these situations an individual has standing where a public right has been interfered with and the individual can show that he has suffered damage peculiar to himself. What constitutes special damage is dependent upon the facts of the case:

> "Depending on the nature of the relief which he seeks a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests and perhaps to his social or political interests..... The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another."[152]

Special damage is damage suffered by a person that is either damage to the interest common to all members of the public but the effects are quantitatively greater to the

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[149] Australian Conservation Foundation Inc v Commonwealth [1980] 146 CLR 493, 527
[150] [1903] 1 Ch 109
[151] Boyce v Paddington Borough Council [1903] 1 Ch 109
[152] Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493, 547 per Mason J

particular person than to other members of the public, or, damage qualitatively different from that suffered by the public generally. Therefore, for a person to have suffered special damage, the damage to an individual must be over and above the damage suffered by the public at large, or, as is often the case, by a relevant section of the public of which the applicant is a member.[153]

The Special Interest Test: The rule in relation to standing for injunction and declaration was reformulated in Australian Conservation Foundation Inc v The Commonwealth[154](the ACF case) by Gibbs J. His Honour found that the test for special damage to be confusing. Gibbs J said the test should be whether the plaintiff has a "special interest in the subject matter of the action".[155] Gibbs J acknowledged that special interest went beyond just legal rights, but did not go as far as to allow an applicant standing who had a mere intellectual belief or concern. Therefore individuals who have financial or proprietary interests satisfy the special interest test.

The Court[156] found against the ACF for two reasons. The first reason had regard to the nature of the interests that were at stake. Special interest is not a special interest if the interest is merely an intellectual or emotional concern with the subject matter. The person must be gaining an advantage not simply the satisfaction of righting a wrong, upholding a principle or winning a contest if the action succeeds, or, must be suffering some disadvantage other than a sense of grievance or debt of costs.[157] Beliefs, however strongly held, that certain laws or parts of laws should be enforced do not give a person

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[153]The Function of Standing Rules in Administrative Law: Peter Cane [1980] PL 302, 313

[154](1980) 146 CLR 493, 527

[155](1980) 146 CLR 493, 527. Many of the cases referred to in this section of the work relate to the "person aggrieved" test used in s3(4) of the AD(JR) Act. The Courts use the ACF case as the basis for interpreting the meaning of the phrase. The ACF case was a case decided in relation to the rules of standing for injunction and declaration prior to the introduction of the AD(JR) Act.

[156]The ACF case was decided by a three to one majority with Gibbs J, Stephen and Mason JJ in the majority and Murphy J dissenting.

[157]Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493, 530 per Gibbs J see also 539 per Stephen J and 548 per Mason J

standing.[158] Second, participation in the initial or primary decision-making process by the ACF was not appropriate in this instance to ground standing. A distinction was drawn between a rule which has the status of policy and a right which is gained from the procedure having been established under delegated legislation.[159]

In Leisure & Entertainment Pty Ltd v Willis[160], the Federal Court addressed the question of the standing of an individual to prosecute an action against the decision of the Treasurer made under the FAT Act. The Plaintiff was found to have no special interest as defined in the case. Leisure & Entertainment Pty Ltd was attempting to purchase Dreamworld. A contract of sale for Dreamworld had been entered into by the Receivers of Dreamworld and Janola Dale Pty Ltd (a foreign person as defined by the FAT Act). The contract was conditional upon Janola Dale Pty Ltd seeking approval from the Treasurer that the purchase complied with the requirements of the FAT Act. Leisure & Entertainment Pty Ltd had influenced the Treasurer to review the purchase of Dreamworld by Janola Dale Pty Ltd. The Treasurer issued a 90 day review order in order to review the purchase under s19(1), s21A(1) and s22 of the FAT Act. The reason for these orders was explained by the Treasurer in two press releases dated the 20th and 21st December 1995. The Treasurer said that approval to proceed with the purchase would be given with certain conditions to Janola Dale Pty Ltd unless Leisure & Entertainment Pty Ltd entered into a contract of sale with the Receivers on substantially the same conditions as with Janola Dale Pty Ltd prior to the 29th December 1995. The Receivers were in no position to enter into such a contract with Leisure & Entertainment Pty Ltd because of a prior contract which existed between themselves and Janola Dale Pty Ltd. To abandon the

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[158]Right to Life Association (NSW) Inc v Secretary, Dept of Human Services and Health (1995) 128 ALR 238

[159]Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493, 531 per Gibbs J and 541 per Stephen J. This puts the ACF case in conflict with Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473 where the plaintiff had standing to seek mandamus against the mining warden as a result of participating in the hearing under the Mining Regulations.

[160]No QG 204 of 1995

contract with Janola Dale Pty Ltd would have exposed the Receivers to a large claim for damages. Leisure & Entertainment Pty Ltd sought an interlocutory injunction pending the hearing of an application for an injunction restraining the Treasurer from approving the application and an order for a writ of mandamus to issue directing the Treasurer to refuse the application by Janola Dale Pty Ltd.

Spender J found Leisure & Entertainment Pty Ltd had no standing. His Honour was influenced initially to find that Leisure & Entertainment Pty Ltd had standing because the two press releases issued by the Treasurer specifically referred to Leisure & Entertainment Pty Ltd and the principal, Mr Palmer. However, the contract which the Treasurer recommended was never obtained. His Honour concluded that Leisure & Entertainment Pty Ltd had no standing since its position in regard to the required contract was no different whether the two press releases had been issued or not.

Spender J closely examined and relied upon the competitor cases of Australian Agricultural Company v Oatmount Pty Ltd[161] and Yates Security Services Pty Ltd v Keating.[162] Both these cases saw a competitor trying to use public law remedies to obtain a competitive and commercial advantage. Both cases resulted in standing not being granted to the plaintiffs.

Spender J noted in his decision the submission of Mr J McGill QC, counsel for the Treasurer, that only a limited function was given to the Treasurer by the FAT Act:

> "Where there is a particular proposed acquisition which he is satisfied is contrary to the national interest, he may prohibit it or impose conditions so as to prevent its being contrary to the national interest.
> Subject to that, everyone is free to sell their property as they wish. It is no part of the Treasurer's function to decide that a vendor is to sell to one person rather than another, or to interfere in commercial negotiations to give one person an advantage over another, particularly an unfair advantage. The Treasurer can not, and will not, force the receivers to sell to Mr Palmer."[163]

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[161](1991) 75 NTR 1
[162](1991) 22 ALD 228
[163]No QG 204 of 1995 ,20

In Yates Security Services Pty Ltd v Keating Lockhart J said:

> "In my opinion, the ability to negotiate for the acquisition and development of the site, even if it is a commercial benefit, is one which Yates has whether it wins the case or not. Like any other member of the public it may negotiate for the acquisition and development of the site."[164]

Leisure & Entertainment Pty Ltd could not fulfil the requirements of Gibbs J's test as they were in effect only winning a contest and not gaining an advantage.

There are two issues that need to be examined because of the adoption of the special interest test. The first is the concept of non-material concerns and interests. This sets the limits for those who can seek standing under the special interest test. The second issue is participation in the initial or primary decision-making process.

(a) Non-material concerns and interests: Emotional and intellectual interests do not give an applicant standing.[165] However, Stephen J in Onus v Alcoa of Australia Ltd[166] shows the difficulty of distinguishing between these concerns and interests.[167] Stephen J regarded the special interest as consisting in the "intimate relationship", the "closeness" or the "proximity" of the applicants to the subject-matter of the action. His Honour said 'that what is a special interest involves "in each case a curial assessment of the importance of the concern which a plaintiff had with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter".[168] Curial assessments of the "intimate relationship" of the applicants to the subject matter of an action have resulted in standing

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[164]No QG 204 of 1995 ,26

[165]Right to Life Association (NSW) Inc v Secretary, Dept of Human Services and Health (1995) 128 ALR 238 restated this rule clearly. See Lockhart J at 251-253 and Beaumont J at 266-267

[166](1981) 149 CLR 289, 299-300

[167]North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617, 630 where Sackville J notes that Stephen J was not convinced that an emotional concern could be a disqualification to standing. In Onus v Alcoa of Australia those who brought the action were able to show that by local Aboriginal law and custom that they were the custodians of the relics, and that these relics were of cultural and spiritual significance to the local Aboriginal community. For an alternative result see Everyone v State of Tasmania [1983] 49 ALR 381

[168](1981) 149 CLR 27, 42. This point was reinforced by Sackville J in North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617, 630

being granted to some community based organisations, but not others.[169] Gummow J stressed that when an applicant is attempting to enforce a public right, the applicant must show that the purposes and the ends advanced by the Parliament in enacting the statute are the same as those being advanced by the applicant in the process of judicial review.[170]

(b) Participation in initial or primary decision-making process: In Sinclair v Mining Warden at Maryborough it was held that where a plaintiff makes submissions under the administrative procedures adopted for the purpose of making the decision, the plaintiff has standing by way of a special interest to see that the procedures are complied with.[171] The rejection of the ACF's argument[172] that it had standing because it had presented an objection to the Minister raises the question whether this is a real basis for standing for declaration and injunction. Gibbs J distinguished Sinclair v Mining Warden at

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[169]In Australian Conservation Foundation v Minister for Resources (1989) 19 ALD 70 Davies J found the ACF had standing to prosecute an action against the Minister for Resources in relation to the wood chipping licences issued in respect of the South East forest area. Davies J found that the evidence showed increased public concern for the environment, the ACF's high profile as the national conservation organisation and that it was both funded and consulted by both the State and Federal Governments. These factors alone didn't give standing, however when they were coupled with the ACF's long running interest in the South East forests standing was granted. Davies J noted that when determining standing it is necessary to take into account current community perceptions and values. Australian Conservation Foundation v Minister for Resources (1989) 19 ALD 70, 74 accepted and followed with approval in North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617, 636. Sackville J in North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617 adopted Davies J reasoning (1994) 127 ALR 617, 636. Here however the environmental organisation was much smaller, had a smaller resources and budget and no full time staff. However the North Coast Environment Organisation was the peak organisation in the area, had Commonwealth and State Government recognition as a "significant and responsible organisation', had conducted conferences and projects of concern in relation to the forests and had been consulted the government in relation to the issuing of saw milling licences in the area. Ogle v Strickland (1987) 71 ALR 41 provides an example, away from the environment organisations, where standing was granted to a plaintiff who had what may be termed an emotional concern in the subject-matter of the action. Here two Christian priests challenged the Censorship Board's decision to import a film into Australia. The two priests alleged that the film was blasphemous. The priests were given standing because they were of a group of committed Christians susceptible to offence and outrage which was not shared by non-believers. (1987) 71 ALR 41, 59 per Wilcox J They were also professionals who were priests and teachers and stood apart from the rest of the community because of their interest to stop the publication and dissemination of a blasphemous work. (1987) 71 ALR 41, 43 per Fisher J and 52-53 per Lockhart J These three case illustrate the necessity for an 'intimate relationship with the subject-matter of the action'.

[170] Right to Life Association (NSW) Inc v Secretary, Dept of Human Services and Health (1995) 128 ALR 238, 270

[171](1975) 132 CLR 473 and **The Laws of Australia**: Administrative Law - Vol 2 Standing para 35

[172]Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493

Maryborough saying that Sinclair had a right to his action because he had appeared before the Mining Warden. In the ACF case, the ACF had lodged an objection and then awaited a reply.[173] There was no appearance before the Minister. The standing of the ACF was rejected because the procedure used to review the comments of the ACF was of no consequence or concern to the ACF.[174]

In Alphapharm Pty Ltd v Smithklein Beecham[175], the court found that a competitor who had no right to be heard but had made submissions does not acquire standing.[176]

In Australia Sinclair v Mining Warden at Maryborough is still the leading case for standing where mandamus is sought. The remedy of mandamus is used to force a public office holder to perform his duty according to law. It is not clear that this would give a person standing who tried to enforce a duty for the general public good. Sinclair, it was found, had a right to have the hearing conducted according to law.[177] However, Sinclair's interest was purely ideological and standing was given. Perhaps in this instance the right to object given by statute may be seen as a legal right that could be enforced. A person has standing if a duty is owed and the performance of the duty is for that persons benefit.[178] For those who do not have a direct interest in the performance of the duty they may have

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[173](1980) 146 CLR 493, 531 for a contrary view see Murphy J at 557

[174](1980) 146 CLR 493, 557; however note that Murphy J held that a plaintiff has a right to be heard because he or she has gone to the trouble to make comments.

[175](1994) 49 FCR 250

[176](1994) 49 FCR 250,269 per Burchett J. In Coles Myer Ltd v O'Brien (1992) 28 NSWLR 525 the Full Court of the Supreme Court of New South Wales gave standing to an objector who had been refused leave to appear before a Licensing Court hearing. The objector had been late in raising it's objections yet had sufficient economic interests to sustain standing.

[177]R v Bowman [1898] 1 QB 663 was the authority used by Barwick CJ to give standing to Sinclair. Bowman's case does not show whether the licensing legislation had a definition of standing for an objector. It assumed that anybody who gave notice would be heard (see also R v Brisbane City Council [1986] 2 Qd R 22, 40).

[178]R v Toohey; ex parte Northern Land Council (1981) 151 CLR 170

standing if they can demonstrate a personal interest or a legal right to enforcement.[179] Grievances must be real and substantial but they need not be financial.[180]

The Special Interest Test and the FAT Act: The stranger[181] trying to establish standing so as to obtain relief from a decision of the Treasurer will find that standing will not be easy to establish. The facts surrounding the action of the applicant are going to be critical. The list of possible strangers is unlimited, however, the following is a review of some of the more likely groups to seek standing.

It must be remembered that when one is examining a person's claim to standing one is not examining the merits of the person's action. That will be examined at a later time.

(1) Australian companies or persons attempting to acquire an Australian business or corporation in competition with a foreign person or corporation: Australian companies are not required to comply with the provisions of the FAT Act. An Australian company or business which is a competitor of a foreign company will not be given standing. Such a company and business is constrained by the argument that it is a competitor attempting to seek a commercial advantage by a using public law remedy. The FAT Act should not be seen as an Act, which creates a public right by which Australian companies or citizens can use the Government or the Courts to stop foreign investment in Australia. Australian companies face the problem that the ends that they are trying to advance through a judicial review action are not the same ends that the Parliament intended to advance when enacting the FAT Act.

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[179]Re Exbea Pty Ltd; ex parte M & Holdings Pty Ltd (1989) 89 ATC 195

[180]Lord Denning attempted to liberalise the test for mandamus to give standing to everyone accept the mere busybody R v Commissioner of Police of the Metropolis: ex parte Blackburn [1968] 2 QB 118

[181]Stranger means a person or a community group or corporation not directly involved in the decision made by the Treasurer. Those who are directly involved are the applicant and the corporation the subject of the acquisition.

(2) Large or small community based groups. Community groups have been successful in obtaining standing in judicial review actions.[182] However, such groups will find it difficult to obtain standing when challenging the FAT Act, as they usually have only an emotional or intellectual interest in the action. These types of groups also face the problem of reconciling the purpose of their judicial review action with the purpose and scope of the Act against which they bring their action. These community based groups would be in direct conflict with stated government policy which promotes foreign investment. An argument based on community expectations put forward by Davies J would not promote the case of community based groups, as there are no nationally recognised groups which campaign for the review of foreign investment. Environmental groups, for instance, would not obtain standing in an action against the FAT Act and would be more successful in stopping certain developments by using the more specific environmental and development legislation. There is no blanket right to standing for environmental organisations simply because the organisation's primary concern is the environment.[183]

Standing is not available to a group of businesses who have joined together to contest the arrival a large foreign company in their area.[184] Such a group could not prove that it would suffer a loss greater than any other member of the community. In addition the loss would be prospective and not immediate. Standing for larger organisations would be enhanced if the organisation is one that is consulted regularly by government and is seen in the eyes of the community to represent reason in the action that it is trying to promote.

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[182] Australian Conservation Foundation Inc v South Australia (1990) 53 SASR 349 (FC): Fraser Island Defenders Organisation v Hervey Bay Town Council [1983] 2 Qd R 72

[183] Australian Conservation Foundation v Minister for Resources (1989) 19 ALD 70 and affirmed in Right to Life Association (NSW) Inc v Secretary, Dept of Human Services and Health (1995) 128 ALR 238

[184] Yates Security Pty Ltd v Keating (1991) 22 ALD 228

The protection of a local historical site from development or the take over by a foreign company of a business owned by a community group that controls and operates a local historical site is an example of where standing might be given to a community group.

(3) Employee Groups: Although unions have a statutory role in industrial matters, that alone does not give them standing in judicial review actions. This may be the case even if individual union members would have standing. Where a takeover is going to result in the laying off of union members or a substantial alteration to the conditions of employment of union members, a union is likely to be able to obtain standing in FAT Act actions, as this would be part of the legitimate role of the union to promote the interest of workers.[185] However, unemployment must be a direct consequence of the takeover. A presumption that unemployment is only a possible outcome of the takeover is unlikely to give the union a basis for standing.

(4) Financial Stakeholders: This heading includes shareholders and creditors of the company which is the subject of the takeover. These people are certain to have standing as they are able to show a pecuniary interest in the outcome of the action.

[185] Administrative & Clerical Officers Assoc v Conn (1988) 52 NTR 57

Chapter 6

Judicial Review - Justiciability:

"The real issue ...is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness of the use of judicial techniques for such purposes."[186]

The Administrative Review Council (the ARC) in its Report [187] acknowledges that justiciability would be the predominant consideration used by the Federal Courts to justify their refusal to review a decision made pursuant to the FAT Act. Where there is an exercise of an executive power or a statutory power involving a Cabinet level decision or a matter of great political sensitivity, justiciability will be a limitation on review.[188] The ARC went on to recommend that decisions made pursuant to the FAT Act should be reviewable under the Administrative Decisions (Judicial Review) Act (the AD(JR) Act).[189] At the moment this is not the case. Section 39B of the Judiciary Act is the only avenue available for judicial review.[190]

Why does the ARC believe that justiciability will be the defining factor when the Federal Court is asked to review decisions which have been made in accordance with the FAT Act? The national interest test has been perceived as a test that only the executive government can answer.[191] The variety of issues that may be taken into account when determining what is or is not in the national interest are legion. The ARC believes that the

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[186] Operation Dismantle v R (1985) 18 DLR (4th) 481, 500 per Wilson J

[187] Administrative Review Council Report No 32: **Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act.** AGPS 1989 (the "ARC Report No 32").

[188] ARC Report No32 p64.

[189] ARC Report No32 p64. see also discussion in Chapter 4.

[190] ARC Report No32 p63

[191] For a non-lawyers point of view see "The Powers of The Senate": The Financial Review Wednesday February 16, 1994 p13; "The Ultimate Decision": The Weekend Australian February 12 - 13, 1994 p21. The Senate Print Media Inquiry p88 para 3.173, p194 para 8.5, p214 para 9.9

issues raised by the national interest test are of a political nature. Therefore the test can and should only be determined by the executive government. There is concern that the test, being polycentric in nature, is not suitable for the judicial process to decide. The ARC is concerned that the Courts may involve themselves in specifying which foreign investment proposals are appropriate. The ARC recommendation that the FAT Act be subject to the provisions of the AD(JR) Act is motivated by the provisions dealing with divestiture[192] and the rearrangement of corporate documents.[193]

Foreign investment applications are treated on a case by case basis. As policy is comprehensive and broad, each application must be designed to comply with the broad requirements. The administration of foreign investment policy has led to the adoption of different policy considerations for different sectors of the economy.[194] Applications for the purchase of residential real estate have caused policy take on the form of rules. Compliance with policy generally results in approval for purchase. This contrasts with applications for acquisition in other sectors of the economy where the application of policy is more fluid. These applications are subject to a more detailed consideration by the Treasurer than are the urban real estate applications. Non urban real estate applications, depending on their size, are approved by either the Treasurer or the Assistant Treasurer.[195]

Justiciability has been described as an "inherently slippery subject" [196]and judicial attempts to define justiciability have been imprecise. A justiciable dispute is one which is proper and apt for submission to the judicial process.[197] Another definition is "a dispute that may appropriately be resolved by the Courts".[198] Justiciability, as a concept in its

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[192]FAT Act s18(4) divestiture of shares; s19(4) divestiture of assets; s21(3) divestiture of businesses
[193]FAT Act s20(3)
[194]**Australia's Foreign Investment Policy**, AGPS, Canberra, September 1992 Ch 2 pp 6 - 12
[195]See discussion in footnote 143
[196]Allars; **Introduction to Australian Administrative Law:** Butterworths 1990 para[1.85] p43
[197]Marshall; Justiciability: Ch X **Oxford Essays in Jurisprudence:** 1961 at page 265
[198]Allars; **Introduction to Australian Administrative Law:** Butterworths 1990 para[1.86] p42

simplest form, is the search for the most appropriate forum in which to resolve disputes. As Melville Wilson[199] points out:

> "The word justiciable .... is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication from which practical consequences in human conduct are to follow."[200]

The question the Court asks is: "Are the Courts the appropriate forum to review FAT Act decisions or is there another forum more appropriate as a review body who should review the decision?" There being no appeal from the Treasurer's decision, the only external review available is judicial review. This review tests the legality of the decision making process; it is not a review of the merits of the decision.[201] Therefore, a person seeking to review the Treasurer's decision is questioning the decision-making process; the person will not receive a review of the merits of the Treasurer's decision. This does not mean that the motive behind seeking a review of the decision is to obtain a review of the merits of the application.

The problem for most litigants in dealing with the FAT Act is the wide variety of issues that are taken into account when determining whether an application should proceed. The FAT Act deals predominantly as a vehicle for the review of the amount of foreign investment in Australia. The Treasurer in permitting investment is making a calculated decision that the particular investment will help increase living standards by providing future benefits to the Australian economy. The Treasurer also hopes that the particular investment will not increase unemployment, result in cultural imperialism or reduce living standards of Australian citizens. Questions of employment, profit, market share, trade practices, the control by foreigners of Australian assets and industry, the export of Australian capital, the increase or decrease of Australian living standards may all

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[199] 'Political Questions' (1925) 38 Harv. L. Rev. 296

[200] 'Political Questions' (1925) 38 Harv. L. Rev. 296 at 299

[201] Church of Scientology Inc v Woodward (1983) 154 CLR 25, 70 per Brennan J

be relevant issues when reviewing an application. It is the polycentric nature of the decision which makes it difficult for resolution before a Court. Wilson J in Operation Dismantle v The Queen[202] cautions that Courts should not absolve themselves from hearing a matter because of the perceived problems with evidence, proof and judicial competence when dealing with matters that contain moral and political considerations. "[I]n response to that contention it can be pointed out that, [the Courts] are called upon all the time to decide questions of principle and policy."[203]

Not all disputes between individuals or groups of individuals or individuals and government are appropriate for solution by Courts. When issues are termed 'justiciable' or 'non-justiciable' by parties to a dispute, the term is frequently being used to justify the resolution of the dispute before the forum in which the disputants perceive that their own best interest will be best served. The appropriate forum may be a Court, or it may be an administrative tribunal or the Cabinet or a departmental officer. However, the term 'justiciable' is most often used in reference to the resolution of a dispute before a Court or quasi-judicial tribunal. The Court is often accepted as an appropriate tribunal as it is perceived as being independent from the executive government; it acts without bias and has defined procedures for gathering and analysing evidence. The decisions of the Court are also final and authoritative and able to be enforced. However, whether it is appropriate to apply judicial techniques to resolving disputes is the critical question. The rules of evidence and the presentation of evidence to a Court within the adversary system may not result in the best decision. Litigants do not have to present all the evidence in relation to the matter before the Court, they only have to present the evidence which promotes the respective case of each party. Evidence may be withheld because public interest immunity attaches to it or the documents are of a highly sensitive commercial nature.

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[202](1985) 18 DCR (4th) 481

[203]Operation Dismantle v The Queen (1985) 18 DCR (4th) 481, 499 per Wilson J

Through the case law the Courts have attempted to resolve which disputes are justiciable and non-justiciable. It has been found necessary to place limits on the disputes which are to be reviewed by the Courts, that is which disputes are determined to be justiciable.[204] First, the Courts will examine the source and subject matter of the power of the administrator. The Courts have to examine the subject matter of the dispute, to see if it has already been decided by the Courts, that this type of decision will not be reviewed. The subjects that are considered non-justiciable are drawn mainly from the prerogative powers.[205] Second, the Courts will examine the status or nature of the decision-maker exercising the power.[206] The Courts have identified certain decision making bodies whose decisions require the Courts to consider carefully whether they will review these decisions.

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[204]For a discussion of the appropriateness of the Courts expertise and competence see Marshall; Justiciability: Ch X **Oxford Essays in Jurisprudence:** 1961; Lon L. Fuller: The Forms and Limits of Adjudication (1978) 92 Harv LR 353; Robert S. Summers: Justiciability (1963) 26 MLR 530

[205]Non-justiciable subjects: The subjects that are considered non-justiciable are drawn mainly from the prerogative powers.(see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374) These include the power to make treaties, matters dealing with the defence of the realm, Australia's relationship with other countries, national security, the prerogative of mercy, granting of honours, the dissolution of Parliament and the appointment of Ministers Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, adopted in Australia in Church of Scientology Inc v Woodward (1983) 154 CLR 25. The Courts consider these prerogative powers. Australia's entry into or breach of an international obligation is not justiciable at the suit of a private citizen. (Koowarta v Bjelke-Petersen (1982) 153 CLR 168). Agreements between Australia and foreign governments are not justiciable (Gerhardy v Brown (1985)159 CLR 70). The Courts are expressing the view that this is an issue solely for the executive government alone. In Coutts v Commonwealth (1984) 157 CLR 91 where an army officer was unable to claim against the Commonwealth for negligence. The prerogative power of defence of the realm was considered non-justiciable by the High Court. National security is a subject which the English Courts are not prepared to examine. The production to the Courts of the Prime Ministers certificate that it is not in the interests of national security that unions should be able to recruit members in the national intelligence gathering centre was held to be conclusive evidence of non-justiciability (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374). Although in Church of Scientology v Woodward (1983) 154 CLR 25 the High Court agreed in that instance with the views of the Australian Security Intelligence Organisation (ASIO) as to the security interests of Australia, the Court was clear that particular acts of ASIO were justiciable upon an allegation of bad faith or whether ASIO's acts were relevant to security and therefore intra vires. There is a problem with determining justiciability by reference to subject matter. A complete decision can be made up of many individual steps. Many of these steps in the decision-making process are able to be challenged and are justiciable. The final decision, however, may in fact be of a subject which is non-justiciable. Yet the Courts in reviewing the preceding steps may have inadvertently strayed into an area that is strictly not for them to review. For further reading see Allars, **An Introduction to Australian Administrative Law**, 1990 at p55.

[206]O'Shea v South Australia (1987) 73 ALR 1 and The Minister for Arts, Heritage and Environment v Peko Wallsend Ltd (1987) 75 ALR 218

These include Ministers[207], Executive Council[208], the Governor-General[209] and Cabinet[210]. There are a variety of reasons why these bodies have been singled out. However, the main reason is that they are at the apex of the government pyramid.

Judicial Review - Justiciability in Relation to The FAT Act

Is the national interest test justiciable? The answer appears simple: the decision of the Treasurer is based on a statutory discretion and is therefore reviewable. As Melville Wilson affirms, any tribunal can make a decision on any question before it. The problematic question is the appropriateness of settling a dispute using judicial techniques where the defining criterion is the national interest. Should the question of a matter being "contrary to the national interest" be answered by the Treasurer alone. Five questions should be considered in determining whether matter concerning the national interest is justiciable.[211] These questions are not relevant to the merits of the judicial review action; they relate only to justiciability.

1. Who is the decision-maker?[212] The decision-maker nominated by the FAT Act is the Treasurer.[213] However, as the FAT Act is administered, the Treasurer is not alone in making the decision. Depending on the size and nature of the transaction the Assistant

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[207]Murpyores Inc Pty Ltd v The Commonwealth (1976) 136 CLR

[208]FAI Insurances Ltd v Winneke (1982) 41 ALR 1

[209]R v Toohey; ex parte Northern Land Council (1981) 151 CLR 170

[210]O'Shea v South Australia (1987) 73 ALR 1

[211]These questions are the same questions that were asked in O'Shea v South Australia (1987) 73 ALR 1 and The Minister for Arts, Heritage and Environment v Peko Wallsend Ltd (1987) 75 ALR 218. Although the Courts did not structure their judgements using these questions, these are the points upon which the judgements are based.

[212]All the judges examine this point closely O'Shea v South Australia (1987) 73 ALR 1,6 per Mason CJ, 18 per Wilson and Toohey JJ, 24 per Brennan J; The Minister for Arts, Heritage and Environment v Peko Wallsend Ltd (1987) 75 ALR 218, 224 per Bowen CJ, 226 per Sheppard J, 251 per Wilcox J. A clear identification is imperative.

[213]FAT Act s18(2), s19(2), s20(2), s21(2) and s21A(2)

Treasurer or the Executive Officer of the FIRB may make decisions. Some of the applications for acquisition may even require the matter be referred to Cabinet.[214]

2. Is the decision-maker influenced by political judgement?[215] The proximity of the decision-maker to the core of politics will influence the deliberations of the Court in determining whether the decision is justiciable or not. The Courts are prepared to review decisions made in proximity to the political core. However, extreme caution in the review of Cabinet decisions can be discerned from the cases, because Cabinet decisions are quintessentially political decisions, and all ministerial decisions are reviewable.[216] It is appropriate to examine two cases where the Courts reviewed decisions made by those closest to the political core.

In O'Shea v South Australia[217] (O'Shea's Case) different views were offered on the question whether Cabinet decisions could be reviewed. Mason CJ took the view that Cabinet decisions were susceptible to judicial review when Cabinet was the decision-maker. His Honour recognised that Cabinet was a body primarily concerned with "the political, economic and social concerns of the moment" and not normally subject to review. But the effect of a Cabinet decision determine whether the dispute is justiciable.[218] Brennan, Wilson and Toohey JJ saw that the decision was one for Executive Council and therefore was a decision of Cabinet.[219] Their Honours noted that Cabinet was involved,

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[214]It is not clear which proposals are referred to Cabinet. However those decisions which are in politically sensitive are no doubt so referred. The Fairfax takeover is an example.

[215]The identification of the decision-maker's proximity to the political core has been used by the courts as a caution as to whether a decision is reviewable.

[216]Murphyores Inc. Pty. Ltd. v The Commonwealth (1976) 136 CLR 1

[217](1987) 73 ALR 1

[218]M.C. Harris in his article "The Courts and The Cabinet: Unfastening the Buckle." 1989 PL 251, 263 makes the point that Mason CJ's judgement reflects "the current judicial impatience with status based immunities based on a constitutional facade".

[219]In South Australia the constitutional practice meant that all Executive Council decisions were Cabinet decisions: see (1987) 73 ALR 1, 6 per Mason J

and therefore, the decision was made in the political process and political considerations applied.[220]

Sheppard J in the Minister for Arts, Heritage and Environment v Peko Wallsend Ltd[221] (Peko's Case) adopted Mason CJ's view that, if Cabinet is given the power to make decisions by statute, then Cabinet decisions are reviewable. However for reasons of public policy, which Sheppard J outlined as the essential nature of the organisation, the fact that Cabinet has no legal status and the sanctions which bind Cabinet are political, Cabinet decisions should only be reviewed with caution.[222] After reviewing the case law, Wilcox J found that Executive Council decisions were open to review upon all the usual grounds of judicial review.[223] Counsel for Peko Wallsend tried to equate the position of Executive Council with Cabinet. Counsel argued that the reasons put forward to support Cabinet's immunity from review, viz 'the doctrine of ministerial responsibility, the fact that decisions often involve policy elements and the general need for confidentiality' - are the same reasons which have been held to be insufficient to exclude any review of Executive Council. Wilcox J concludes: "I think that there is substance in this."[224]

The Executive Officer of the FIRB is able to make decisions in relation to applications for the purchase of residential real estate. The Executive Officer is a senior bureaucrat and, therefore, an unelected official. The Executive Officer is removed from the core of political decision-making. The Executive Officer is not a politician and decisions made by the Executive Officer should be treated as if they were made under an ordinary statutory discretion.

The Treasurer examines the remaining transactions. These include transactions which are complex or of a potentially explosive political nature. Some of these more

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[220](1987) 73 ALR 1, 18, 24. Deane J took a contra view saying that where a decision is one that affects an individual politics is not an issue ((1987) 73 ALR 1, 30)
[221](1987)75 ALR 218
[222](1987)75 ALR 218, 227
[223]Ibid p247
[224]Ibid p247

complex transactions are referred to Cabinet for review. The involvement of Cabinet in the process will make some judges wary of reviewing the decision. The involvement of Cabinet in the decision-making process may raise the prospect that those decisions in which Cabinet is involved are not to be susceptible to judicial review. However, when Cabinet is not involved in the decision-making process, the Treasurer's decision becomes susceptible to judicial review. This form of demarcation between those decisions which are justiciable and those which are not seem to be arbitrary.[225]

3. What is the subject matter of the decision? One must examine the subject-matter of the decision to determine whether it fits within one of the accepted categories of a non-justiciable matter.[226] Decisions under the FAT Act involve economic and social matters. There appears to be no evidence of any application whose matter falls into one of the categories which have been deemed to be non-justiciable. However, counsel for the Treasurer in Leisure & Entertainment Pty Ltd v Willis[227]made a submission that any decision by the Treasurer or the Courts to overturn the contract involved in this case would damage the international commercial reputation of Australia. This submission implied that there were matters in the decisions made by the Treasurer which would affect the external relations of Australia with other countries and, therefore, the whole matter was non-justiciable. Spender J noted this submission in his judgement, although he did not comment on it directly: decisions made by the Treasurer certainly could affect the international commercial reputation of Australia; however, this reputation is not part of the relationship of Australia with other countries as referred to in the categories of non-justiciable matter.

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[225]See Peter Bayne: Justiciability: The Report of the Administrative Review Council (1989) 63 ALJ 767 and Natural Justice, Public Policy and Justiciability (1988) 62 ALJ 225 on the possible implications of Cabinet being brought into the decision-making process.
[226]see footnote 205
[227]No QG 204 of 1995, 20

4. Is the decision of the Treasurer one of 'general policy' or a decision of an 'individual nature'[228]? The O'Shea Case and the Peko Case are examples of the two types of decision being discussed. The decision being reviewed in Peko's Case was a 'general policy' decision. Although Peko Wallsend was going to have its exploration rights severely curtailed the Court found that Cabinet's decision was of a general policy nature. There were, as Bowen CJ described it;

> "complex policy questions relating to the environment, the rights of Aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of [Peko Wallsend].... Decisions have to be taken in the public interest, notwithstanding that the lives, interests and rights of some individual citizens may be adversely affected by the decision."[229]

These general policy decisions are of a political nature.

A similar sentiment was expressed by Lord Radcliffe in Chandler v Director of Public Prosecutions:[230]

> "The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think there is anything amiss with a legal ruling that does not make this a matter for a judge or jury."

The Courts are not to see themselves as substitute decision-makers.

The Courts in Peko's Case and in O'Shea's Case[231] found that where a matter of general policy is involved there would be no review of the decision. Phrases such as 'public interest', 'ministerial policy giving effect to the public interest', 'public opinion' and 'public policy reasons' are used to identify the Cabinet decision as one of a general nature and,

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[228]This is the distinction that was adopted in both O'Shea v South Australia (1987) 73 ALR 1 and The Minister for Arts, Heritage and Environment v Peko Wallsend Ltd (1987) 75 ALR 218

[229](1987) 75 ALR 218, 225 per Bowen CJ

[230][1962] 3 All ER 142, 151

[231]O'Shea v South Australia (1987) 73 ALR 1 the majority on this issue were Brennan ,Wilson and Toohey JJ. Mason CJ and Deane J were in agreement.

therefore, applicable to all. Brennan J held that where general policy is concerned, and in this instance it is called the "public interest", then this is a matter of political responsibility:

> "When we reach the area of ministerial policy giving effect to the public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free from procedural constraints; he is or they are confined only by the limits otherwise expressed by statute."[232]

Some of the judges seemed to imply that when the public interest is involved the Courts are unable to review the decision.[233] The forum in which one challenges these decisions should, therefore, be a political forum. Wilson and Toohey JJ argued that the Courts have no role in the review of these types of decisions. M.C. Harris argues that there is an implication in the joint judgement of Wilson and Toohey JJ that all decisions of Cabinet are non-justiciable.[234] Although the decisions in Peko's Case and in O'Shea's Case under challenge were decisions of Cabinet, members of both Courts implied that similar considerations would apply to a ministerial decision giving effect to the public interest.[235] However, caution must be exercised before proceeding further in this discussion. Brennan J in Church of Scientology v Woodward[236] spoke of the ability of the Courts to review subjects of national security in the following way:

> "The court is not bound by the Organization's opinion as to what constitutes security or what is relevant to it. As Lord Devlin said in Chandler v Director of Public Prosecutions: 'There is no rule of common law that whenever questions of national security are being considered by any court for any purposes, it is what the Crown thinks to be necessary or expedient that counts, and not what is necessary or expedient in fact.....It is sufficient to say that the difficulties inherent in questions of national security do not affect the justiciability of the issues, though they are of

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[232](1987) 73 ALR 1,25

[233]O'Shea v South Australia (1987) 73 ALR 1,17 per Wilson and Toohey JJ joint judgement. Here their Honours adopt the words of Lord Scarman in Re Findley [1985] AC 318, 332-3 "But neither the Board nor the judiciary can be as close, or as sensitive, to public opinion as a Minister responsible to Parliament and the electorate. He has to judge the public acceptability of early release and to determine the policies needed to maintain public confidence in the system of criminal justice." Their Honours also distinguished FAI Insurances Ltd v Winneke at (1987) 73 ALR 1, 20 saying "There was little, if any, room for the

> major importance in determining the sufficiency of evidence bearing on those issues"

Therefore, the interests of a government do not always agree with the national interest. Peko's Case and Chandler v Director of Public Prosecutions indicate that, where there are polycentric decisions of a type similar to those decisions made under the FAT Act, the Courts will be inclined not to grant judicial review. However, Brennan's caution from Church of Scientology v Woodward would suggest that difficult questions, such as those which involve national security, are still justiciable. These difficult questions affect the sufficiency of evidence and not justiciability.

Decisions which are of an individual nature, on the other hand, must refer to the individual solely or be such that the decision could only refer to a small group of individuals, where the individual may face imprisonment or loss of financial freedom.[237] O'Shea's Case dealt with Mr O'Shea's application for freedom from imprisonment. The decision of Cabinet in this matter was considered not to be of an individual nature and therefore did not qualify for review, despite the strong dissent of Deane J.[238] The decision of the Court seems extraordinary as the matter for decision could not be patently more individually based. However the decision must be seen in the light of the particular statutory provisions which guide the South Australian parole system. This does not detract from the proposition that a decision by Cabinet relating to an individual is reviewable.

The test adopted by Wilcox J in the Peko Case is the more likely test to be adopted in matters where the issues are relevant to an individual. This test was first expounded by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service.[239] The

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[237]O'Shea v South Australia (1987) 73 ALR 1 only referred to personal liberty. However if the Cabinet were to deliberately take away a person's financial liberty, and the decision was directed at that person, and not as part of a wider community action, then a similar argument could be made.

[238](1987) 73 ALR 1,26

[239]Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374 Lord Diplock's test is:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or(b) by depriving him of some benefit or advantage which either (i) he had in the past

test requires that an individual must have a right, obligation or legitimate expectation that is affected by the decision. The core of the test, however, is that the decision under review has a direct and immediate consequence, and not some likelihood of a consequence or effect at some time in the future. Therefore, there must be a direct and immediate effect on the rights, obligations and legitimate expectations of the person seeking review. In the Peko Case, Wilcox J noted that, even if this test were satisfied, a decision may not be justiciable because it might come within one of the categories which was regarded as being non-justiciable.

The legitimate expectation of the applicant to invest is that his application will be dealt with according to stated policy. The question becomes more complex where the applicant for judicial review is not the applicant investing, that is a stranger to the application. A stranger must show that a right, obligation or legitimate expectation of his will be affected by the Treasurer's decision. The stranger must then show that as the direct and immediate consequence of the Treasurer's decision, his asserted right, obligation or legitimate expectation will be affected. Wilcox J outlines the types of decisions that Cabinet makes everyday which disadvantage people.[240] Included in this list are decisions to spend or not to spend public monies on social programmes, and decisions to construct or not to construct buildings or roads. These may have grave consequences upon a person but the decision is not justiciable.

> "Government, at all levels, would become unworkable if there were an obligation, before making any decision which may be financially disadvantageous to an individual, to seek out and to hear all the affected persons."[241]

Wilcox J highlights the effect that the decision of Cabinet had on Peko-EZ as:

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been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn..."

[240](1987) 75 ALR 218, 251

[241](1987) 75 ALR 218, 251

> 'Peko-EZ was in much the same situation as the owner of a service station who finds its value diminished by a government decision to re-route a highway. The existing rights remain, but they have been made less valuable."[242]

For strangers who object to the Treasurer's decision and who are competitors of the applicant to invest, there will be no immediate effect from the Treasurer's decision. The decision to allow an investment may in the long term reduce the profits of an Australian or even force an Australian out of business, but that must be left to the marketplace.

Which category includes the decisions of the Treasurer? Decisions relating to the purchase of urban land clearly come within the Wilcox test. Applications are judged by a defined set of rules and practices. The Treasurer's decision to disallow a purchase when all the policy requirements have been fulfilled would deny a legitimate expectation to purchase, especially where policy states that a proposal will be accepted if it complies with one of the accepted categories.[243]

The non-residential real estate transactions pose a difficulty. Is the decision of the Treasurer in relation to non-residential real estate of a general policy type or a decision which is directed at an individual? Decisions of the Treasurer have elements of both types of decisions. The decisions are polycentric, but they are directed to one applicant. The Courts decide whether the FAT Act will apply to each case on the facts. That the FAT Act is susceptible to judicial review is unquestionable. The Courts, however, may decide that, in relation to applications to invest, they are not qualified to review the decision making process. A decision in relation to divestiture is justiciable as it affects an individual and qualifies under the Wilcox test.

The national interest test, being undefined, means that the Treasurer must first define the policy of what is contrary to the national interest before he can apply that policy to a decision. The policy must not be ultra vires the FAT Act. The policy has been kept

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[242](1987) 75 ALR 218, 252

[243]**Australia's Foreign Investment Policy**, AGPS, Canberra, September 1992 Ch 2 p 11

deliberately fluid. The overriding philosophy that determines foreign investment policy is benefit to Australia. Therefore, few, if any, legitimate proposals are going to be rejected. Those proposals which are rejected are rejected for reasons that they simply do not conform with the stated policy. However, even where a decision does not conform with stated policy, there is great difficulty overturning the decision.[244] The criterion for determining applications is cast in the negative, viz that the application must be contrary to the national interest. Therefore, the Treasurer must be satisfied that the national interest will not be detrimentally affected. It does not mean that the national interest is not going to be promoted.

The Treasurer and the bureaucrats involved in the FAT Act decision-making process are convinced that this area of decision-making is no place for judicial interference. The fact that there are few detailed rules and limited statutory requirements and forms to be complied with, and the practice of informal discussions to assist in the structuring of the application, suggest that the Act was designed to be applied in a fluid and relaxed manner. The decision making processes have not been judicialised.

However, the FAT Act imposes quite draconian penalties for non-compliance. The Treasurer can order the divestiture of shares and assets. He may institute criminal proceedings to enforce compliance. The proper application of these penalties can only be made through the Courts. Therefore, the Courts have a role in reviewing the decisions of the Treasurer.

5. Are the grounds for judicial review appropriate when applied to the Treasurer's decision? For a person wishing to challenge a decision of the Treasurer, the decision is more likely to be justiciable than not. The Treasurer's decision may involve matters that relate to policy and are complex in nature. There is no doubt that the decisions of the Treasurer take heed of politically sensitive issues. However, the Courts are not averse to

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[244]Leisure & Entertainment Pty Ltd v Willis No QG 204 of 1995

resolving disputes that involve questions of a polycentric nature. Examples include the complex commercial matters of trade practices or the complex social matters involved in the decisions of the Family Court. The Courts examine decisions for compliance with the law. However, when Parliament gives a discretion to a Minister, it is for the Minister to exercise the discretion. This point was made by Spender J in Leisure & Entertainment Pty Ltd v Willis:

> "[The] question [of what is contrary to the national interest] is, by legislation, consigned to the Treasurer and it is his opinion which is necessary as a precondition to the exercise of his discretion."[245]

The delimiting factor, however, is that it is difficult to establish a rational test which can appropriately distinguish those decisions which are appropriate for review and those which are not. Each application for review of the Treasurer's discretion must be considered on its own facts. The discretion of the Treasurer is a statutory discretion and it is confined by the terms of the FAT Act. The evidence before the Court will allow the Court to examine each decision and use its own discretion to determine which applications should succeed and which should not.

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[245]No QG 204 of 1995, 31

Chapter 7

Judicial Review: Grounds of Review

Review of statutory discretions

To keep decision-makers within the bounds of the legislative framework is the role of judicial review. The Courts have held that even the widest discretion has limits and these limits are to be found within the statute itself. Stephen J in R v Toohey; ex parte Northern Land Council said:

> "It will be seldom, if ever, that the extent of the power cannot be seen to exclude from consideration by a decision-maker all corrupt or entirely personal and whimsical considerations, considerations which are unconnected with proper governmental administration.[246]... [T]he task for the court will be to discern what restraints, if any, the legislation places upon considerations to which he may have regard.... Where a Parliament confers powers they will seldom, if ever be conferred in gross, devoid of purposes or criteria express or implied, by reference to which they are intended to be exercised. Unless a Parliament, acting constitutionally, can be seen from the terms of its grant of power to have excluded judicial review, the courts will, at the instance of a litigant, examine the exercise of powers so granted determining whether the exercise is within their scope of Parliament's grant of power."[247]

The Courts are obligated to determine the limits of a Minister's discretion. The Courts look first to see if the legislation is within the legislative competence of the Parliament to enact. The Commonwealth Parliament is competent to enact the FAT Act legislation by

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[246] Stephen J is quoting from his earlier judgement in Murphyores Inc Pty. Ltd. v The Commonwealth (1976) 136 CLR 1, 12

[247] Stephen J in R v Toohey; ex parte Northern Land Council (1980-81) 151 CLR 170, 203, 204 Mason J in Murphyores Inc Pty Ltd v The Commonwealth (1976) 136 CLR 1, 23 made the following comments about the court's ability to determine the width of a statutory discretion:
" .... the subject matter and the scope and purpose of a statutory enactment may enable a court to pronounce the reasons given for the exercise of a statutory discretion to be extraneous to any objects the legislature had in mind ...." quoted with approval by Stephen J in R v Toohey; ex parte Northern Land Council (1980-81) 151 CLR 170, 203.

virtue of its trade and commerce and the external affairs powers.[248] Second they examine the subject matter of the enactment and the terms of the particular discretion to establish the limits of the discretion. Third, the Courts examine the relevant decision to see that it is made within the terms of the discretion and the power has not been exercised "outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact."[249]

The second task for the Court (*supra*) is to examine the subject matter, scope and purpose of the enactment and the relevant discretion to establish the limits of the discretion. "Contrary to the national interest" is the only test under the FAT Act the Treasurer is required to apply when deciding whether an application to invest in Australia is acceptable or not. The test that the Treasurer must apply seems deceptively simple. Does the test 'contrary to the national interest' have form or limits?

The short title of the FAT Act reads the Foreign Acquisitions and Takeovers Act. The long title reads "An Act relating to the foreign acquisition of certain land interests and to the foreign control of certain business enterprises and mineral rights." Pertinent matters are raised by these titles: first, there must be a foreigner or foreign interest involved in the proposed transaction and, second, the foreigner or foreign interest must be acquiring an interest in land or taking over or controlling a business or a mineral right in Australia. The FAT Act therefore has nothing to do with domestic takeovers.

The protection of the ownership of Australian land, protection and retention of the control of Australian businesses and retention of control and ownership of Australian natural resources make up the subject matter of the FAT Act. Control is the principal concept raised by the long and short titles. Control refers to the ability of the Treasurer to review the volume of foreign investment, as well as to control the ability of a foreign corporation to acquire an Australian corporation, business or resources. The FAT Act has been administered on the premise that foreign investment is of benefit to the community

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[248]The Constutition s 51 pl(i) and (xxix)

[249]Lord Wilberforce Laker Airways v Department of Trade [1977] AC 1014, 1047

through the increased availability of capital, employment opportunities, the introduction of new technology and management skills and the creation of new industries. The control exercised by the Treasurer means that this capital and new technology can be directed to areas determined by the government to be most in need. These areas are set out in the foreign investment policy.

The FAT Act attempts to view those transactions which are of a reasonable size and will impact on the economy.[250] The 1989 amendments to the FAT Act exempted many transactions from review on the basis that the monetary value of the transaction was too small. As has been stated, the FAT Act requires the notification of takeovers by acquisition of shares. Acquisition or control by the other methods ie board representation, changes to the constituent documents of corporations, purchase of assets, profit sharing schemes are also reviewable.[251] Takeovers in the broadcasting and banking sectors must comply with separate legislation.[252] Therefore jurisdiction under the FAT Act is governed not only by the mechanics of the transaction, but also, by the monetary value of the transaction.

The FAT Act requires that all transactions for the purchase of Australian urban land be notified regardless of the size[253]. Certain exemptions from notification are permitted by regulation. These exemptions relate mainly to charities and investments by insurance companies where the main beneficiaries are Australian.[254] There are also exemptions for certain schemes for the purchase of land under "off the plan

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[250]The FAT Act set thresholds by a combination of sections see the section headed 'The FAT Act : A Short Analysis'

[251]Acquisitions or takeovers by acquisition of shares - s18 & s26; Acquisition of assets - s19; Arrangements relating to directorates of corporations - s20; Arrangements relating to the control of Australian business - s21; Acquisition of an interest in Australian urban land - s21A & s26A.

[252]In relation to broadcasting an applicant must comply with the Broadcasting Services Act 1992. In relation to banks an applicant must comply with the Banking Act 1959 and the Bank (Shareholdings) Act 1972. Special policy also applies in the Aviation and Mining sectors: see **Australia's Foreign Investment Policy**, AGPS, Canberra, September 1992 p6 and 7

[253]FAT Act s21A & s26A

[254]See regulations 3(a) - (e)

arrangements".[255] New immigrants are also exempt from the provisions of the FAT Act when purchasing residential real estate.[256]

The FAT Act has a number of provisions to ensure compliance with its terms. Failure to comply with the compulsory reporting provisions in s26 and s26A can result in fines of up to $ 10,000 or imprisonment in the case of individuals and $ 250,000 in the case of a corporation. Anti-avoidance provisions, if proved, can result in the divestiture of assets or rearrangement of the investment. The Treasurer may also order divestiture of other proposals which are subject to prohibition.

The purpose of the FAT Act is to give the Treasurer, as the chief economic officer of the Commonwealth, the power to control and to review the flow of capital into the country where this capital is used to acquire Australian companies, business, land or resources. The FAT Act also allows the Treasurer to review other forms of takeover where the injection of capital, into a business is not the primary instrument of the takeover but where the takeover is achieved through board appointments, profit sharing schemes, and the purchase of the assets of a corporation or a business. Therefore, the Treasurer is able to review and control the volume of foreign investment, to direct this investment to areas where it would be most beneficial and to prohibit undesirable investments and acquisitions. The FAT Act was not designed to be used as a tool by Australian businesses in the market place to protect them from competition by foreign businesses and corporations. The FAT Act is designed to keep the Government informed about the flow of capital into Australia and the purposes for which the capital is being used.

The FAT Act differs from most legislation as it does not try to write government policy into legislation. Instead it attempts to give the Treasurer the ability to examine all foreign investment proposals in line with a fluid policy which is not at any time formally

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[255]See regulations 3(h) - (j) See also **Foreign Investment Review Board: Report 1994 - 95** AGPS Canberra 1996 p24 - 31

[256]See regulation 3(q)

set by strict rules. This fluid policy must, therefore, be the basis of the national interest. Therefore each application is to be judged on its own merits and not always with reference to past applications of a similar nature.

As has been stated "national interest" is a very hard term to define. The power is given to the Treasurer both to define "national interest" and to use the definition as a yardstick in judging applications for foreign investment. In Leisure & Entertainment Pty Ltd v Willis Spender J found that:

> "The ambit of the power conferred on the Treasurer is very wide. It is predicated by, apart from the factual circumstances of the parties, his opinion as to whether a proposal is contrary to the national interest."[257]

His Honour would not direct how the discretion should be exercised. Spender J offered no analysis of what matters make up the national interest. Spender J referred to Stephen J in Murphyores Incorporated Pty Ltd v The Commonwealth who, after examining a matter which involved a 'breadth of considerations', said that the only reason a Court should intervene to review a decision made under a statutory discretion, is where there has been a lack of bona fides.[258] Bad faith is a notoriously difficult ground of review to prove without clear evidence, evidence in relation to foreign investment applications which is going to be very difficult to obtain. This implies that national interest is an impossible notion to encapsulate and not a concept to be tackled by the Courts for affirmation. There has, as yet, been no case where a person has challenged a divestiture order or challenged the conditions imposed on an application to invest on the ground that the conditions are ultra vires. When such an action is submitted to a Court, that will provide the impetus for a detailed examination of the Treasurer's discretion with regard to the national interest.

Relevant and Irrelevant Considerations

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[257]No QG 204 of 1995, 31
[258](1975 - 76) 136 CLR 1, 14

The discretion by the Treasurer to determine that an application is 'contrary to the national interest' is an unconfined discretion. The FAT Act provides no guidelines on which considerations are relevant or irrelevant in the exercise of the Treasurer's discretion. The failure to take into account relevant considerations and the taking into account irrelevant considerations are grounds of review open to a litigant challenging the Treasurer's decisions.[259]

Faced with a claim that the Treasurer has taken into account an irrelevant consideration, the Court will examine the scope, subject-matter and purpose of the FAT Act to determine whether there are any limitations implied on the factors that the Treasurer may legitimately take into account. When the Court examines an unconfined discretion to see if all relevant considerations have been taken into account, the Court will examine the Act to determine whether these considerations are implied by the Act.[260] The Courts may not to make a decision for the decision-maker. Only the decision-maker may determine the weight given to a factor used by the Treasurer to make the decision. Mason J in Minister for Aboriginal Affairs v Peko-Wallsend Ltd[261] said:

> "in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given weight to a relevant factor of no great importance [on the ground] that the decision is 'manifestly unreasonable' "[262]

However, the Courts proceed cautiously to ensure that they do not review the decision on its merits, but only examine the decision-making process. Mason J noted in relation to decisions made by Ministers that:

> "due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion"[263]

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[259]Minister for Aboriginal Affairs v Peko-Wallsend (1986) 60 ALJR 560

[260]For a detailed discussion see Relevant and Irrelevant Considerations Peter Bayne (1988) 62 ALJR 71

[261](1986) 60 ALJR 560, 566

[262](1986) 60 ALJR 560, 566

[263](1986) 60 ALJR 560, 566

The discretion which is given to the Treasurer is very broad, the discretion is his to exercise. When considering an application, there are no stated factors which the Treasurer must take into account. Therefore, the relevance or irrelevance of factors differs in every case. There can be little doubt after Leisure & Entertainment Pty Ltd v Willis, that a competitor who challenges a decision of the Treasurer on the grounds of relevant and irrelevant considerations will be unsuccessful. However, where an investor challenges the conditions imposed on his application, a review of the reasons given by the Treasurer for the decision may reveal that the Treasurer had misconceived which factors should be taken into account and which should not. The review of a divestiture order will see the effective use of these two grounds of review. The divestiture order in relation to the purchase of shares and the purchase of residential real estate can only be made if the investor has failed to comply with conditions imposed on the investment. Therefore, the Courts will have to examine and determine whether the conditions were intra vires the FAT Act and whether the investor had complied with these conditions. The factors considered by the Treasurer as relevant or irrelevant when making the order to divest become an issue.

Natural Justice

The law of natural justice or "procedural fairness", according to current nomenclature, has undergone considerable change in recent times. In Annetts v McCann[264] the High Court restated the rule for the implication of natural justice as follows:

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment."[265]

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[264](1990) 170 CLR 596

[265](1990) 170 CLR 596, 598. In Salemi v Mackellar (No 2) Barwick J held that the obligation to accord natural justice "springs from the construction by the courts of the statute, in particular of the terms in which the power is granted, the nature of the power of the decision or action, the identity of the donee of the power and of its subject-matter".(1977) 137 CLR 396, 401 Mason J in Kioa v West (1985) 62 ALR 321 put the test as: "When an order is made which will deprive a person of some right or interest or

This statement received clear support in the joint judgement of Mason CJ, Dawson, Toohey and Gaudron JJ's in Ainsworth v Criminal Justice Commission (Ainsworth's Case).[266] Brennan J in a separate judgment in Ainsworth's Case also agreed with the 'thrust of the proposition'.[267] His Honour noted that he had not been convinced of the use of the expression 'legitimate expectations' since Kioa v West[268] This lack of conviction has continued. His Honour says that:

> "If a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power.

"The majority in Annetts v McCann went on to observe:

> "In Kioa v West, Mason J said that the law in relation to administrative decisions 'has now developed to the point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect the rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.' In Haoucher, Deane J. said that the law seemed to him 'to be moving toward a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying to governmental executive decision-making'."[269]

On the possible displacement of the implication of procedural fairness, Brennan J in Ainsworth v Criminal Justice Commission observed:

> "the observance of the rules of natural justice conditions the exercise of a statutory power thus: 'the presumption applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or is apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public. Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is exercised.' "[270]

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legitimate expectation of a benefit, he is entitled to the case sought to be made against him and given an opportunity of replying to it."

[266](1992) 66 ALJR 271, 276

[267](1992) 66 ALR 271, 282

[268](1985) 62 ALR 321, 373

[269](1990) 170 CLR 596, 598.

[270](1992) 66 ALJR 271, 282 quoting from his judgement in Kioa v West (1985) 159 CLR 500, 619

Opinion of the High Court in Annetts v McCann and in Ainsworth v Criminal Justice Commission indicates that the rules of natural justice are to be applied to a decision under the FAT Act which destroys, defeats or prejudices a persons' rights interests or legitimate expectations, unless there is a clear statutory intention for the rules not to apply. This intention must be clear. Section 18(2) of the FAT Act requires that, once a transaction is found to be subject to the section, the Treasurer must decide whether the transaction is contrary to the national interest. This section is subject to the compulsory reporting requirements of s26. This section differs from the divestiture sections as the applicant has not made or taken any steps toward investing. The application is a notification of an intention to invest. This situation resembles the application cases referred to by Megarry V-C in McInnes v Onslow-Fane.[271] The applicant is only applying for permission to invest. The applicant can only expect that the application will be considered in the context of the stated policy. Should the stated policy change while the application is being processed or information is forwarded to the Treasurer which would defeat the proposal of the applicant, then the applicant would be entitled to a hearing concerning the changes of policy or the adverse findings, but not the application as a whole.

The position of the stranger wishing to be heard in relation to an application creates a further difficulty. The question arises: Does the obligation placed by the statute on the Treasurer make his decision one that is directed to the rights and expectations of the individual or is the decision of the Treasurer one which affects the community at large or a section of it? In Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)[272] Hill and Heerey JJ held that there is a clear distinction between cases which refer to 'procedures affecting personal or property rights or expectations', that is between decisions which pertain to the individual in contrast to decisions which pertain to the community at

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[271][1978] 1 WLR 1520
[272](1991) 32 FCR 219

large.[273] Decisions under the FAT Act are directed at the individual. Each application is decided on its merits. However the rules of natural justice may not apply to all decisions under the FAT Act, but only to those decisions which affect the rights, interests or legitimate expectations of the complainant. As it is unlikely that natural justice will be implied into s18(2) an applicant will have no success in pleading this ground, except in circumstance mentioned above. A stranger is unlikely to fare any better. In the situation where misleading statements are made about an Australian company and its ability to complete a transaction and the Treasurer relies on such statements in coming to his decision, the Australian company seeking the hearing to correct the misleading statements may be granted a hearing. The hearing would be to correct the misleading statements. However, the secrecy which surrounds an application made to the FIRB will make it unlikely that the Australian company will be able to obtain any of the information which the Treasurer considered in making his decision. Therefore any application for a hearing is unlikely to be timely.

The rules of natural justice will apply where divestiture is ordered[274], despite the fact that the Treasurer's discretion is unconfined. By use of the divestiture provisions the Treasurer can alter transactions and agreements already entered into or completed. The discretion to order divestiture is unconfined. Although this suggests that Parliament intended that natural justice would not apply to any order for divestiture, it is only a suggestion and does not amount to "plain words of necessary intendment".[275] There can be little doubt that the legislature intended the Treasurer to be in a position to remove assets or rearrange company documents without first giving the parties to the transaction an opportunity to speak. This is even more certain when these orders can be enforced by criminal sanctions. The form of the hearing depends on the facts in each case.

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[273](1991) 32 FCR 219, 238
[274]FAT Act s18(4)
[275]Annetts v McCann (1990) 170 CLR 596

Chapter 8

Conclusion

The FAT Act is a fascinating study for the public lawyer. Decisions of the Treasurer under Part II of the FAT Act are difficult for the stranger to challenge. Therefore competitors, employee groups and community groups will have no success in getting the Courts to review the decisions of the Treasurer. However there is some hope of success for the litigant who attempts to challenge the conditions which are imposed on an application or a decision of the Treasurer to order divestiture of assets. The ARC has recommended that the FAT Act should be subject to the provisions of the AD(JR) Act. The Department of Treasury objected noting that the decisions of the Treasurer are inappropriate for review and that in would lead to an increase in litigation of the decisions of the Treasurer. It would appear that there would be no increase in litigation in relation to the FAT Act nor would the chances of reviewing the Treasurer's decision be increased. However, conditions attached to applications to invest and divestiture orders would be more easily reviewed.

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